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# Circuit Court of Appeals

For the Ninth Circuit. /

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## Transcript of Record.

(IN THREE VOLUMES.)

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R. P. BUTCHART and CLARK M. MOORE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

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### VOLUME II.

(Pages 321 to 672, Inclusive.)

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Upon Writ of Error to the United States District Court of the  
District of Oregon.

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**F. D. MONCKTON,**  
CLERK.







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(Testimony of C. T. W. Hollister.)

Thereupon another of the invoices identified by the witness was offered in evidence and read to the jury, marked Defendants' Exhibit 43.

"Prineville is just east of Redmond, about 30 miles east of the Deschutes River. It is west of Umatilla, that would be northeast of Drain or Roseburg. The price at which this cement was sold was a 12 cent cut under California mills and a 10 cent cut under Lehigh per barrel."

"This is an invoice to the Bill Miller Lumber Company, Bend, dated July 25th, 1916."

The same is introduced in evidence marked Defendants' Exhibit 44 and read to the jury.

"I am familiar with the price of our competitors at that point at the time the shipment was made; it was 12 cents under California and 10 cents under Lehigh.

This is an invoice to Arlington Lumber Company, at Condon, Oregon, dated July 25, 1916."

The same is introduced in evidence marked Defendants' Exhibit 45 and read to the jury.

"Condon is at the end of the Condon branch in Eastern [289] Oregon, east of the Deschutes and west of Umatilla. This invoice shows a 2 cents a barrel cut due to cash discount over competitors' price at that point. I was familiar with competitors' prices at that point.

This is an invoice to the S. P. & S. Ry. for shipment to Vancouver, Washington, dated July 26, 1916."

The same is introduced in evidence marked Defendants' Exhibit 46 and read to the jury.

(Testimony of C. T. W. Hollister.)

"This is an invoice to the Maryhill Land Company, dated August 2, 1916."

The same is introduced in evidence marked Defendants' Exhibit 47 and read to the jury.

"Basing out of Portland for the California mills our rate from Oswego would be 10 cents a barrel higher than the rate from Portland.

This is an invoice to H. J. Dean, Roseburg, Oregon, dated August 5, 1916."

The same is introduced in evidence marked Defendants' Exhibit 48 and read to the jury.

"Roseburg is in Oregon.

This is an invoice to Murphy-Wann, at Marshfield, Oregon, dated August 7, 1916, shipped to Myrtle Point."

The same is introduced in evidence marked Defendants' Exhibit 49 and read to the jury.

"The list price at that point was \$2.82 and this bill met the price at that point due to water competition from California.

This is an invoice to the Hunt Engineering Company, Gold Hill, Oregon, dated August 7, 1916."

The same is introduced in evidence marked Defendants' Exhibit 50 and read to the jury. [290]

"This is an invoice to Lebo, at Aberdeen, Washington, dated August 9, 1916."

The same was introduced in evidence, marked Defendants' Exhibit 51 and read to the jury.

"This is an invoice to the Maryhill Land Company, dated August 10, 1916."

(Testimony of C. T. W. Hollister.)

The same was introduced in evidence, marked Defendants' Exhibit 52 and read to the jury.

"This is an invoice to the S. P. & S. Ry. for Vancouver shipment, dated August 14, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 53 and read to the jury.

"This is an invoice to Stearns & Chenoweth, at Oakland, Oregon, dated August 14, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 54 and read to the jury.

"Oakland is 20 miles south of Drain and north of Roseburg."

"This is an invoice to King & Company, at Prineville, Oregon, dated August 14, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 55 and read to the jury.

"I am familiar with the competitors' prices at that point at the time the shipment was made. This invoice shows a cut of 12 cents over California and 10 cents over Lehigh; that is Lehigh's price was 10 cents higher and the California price was 12 cents higher.

This is a bill to Murphy-Wann, for shipment to Coquille, dated August 14, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 56 and read to the jury. [291]

"Coquille is in Coos County on the coast near Marshfield; it is south of a line drawn through Drain. I cannot say whether it is north or south of a line drawn through Roseburg.



(Testimony of C. T. W. Hollister.)

This is an invoice to Bend Hardware, dated August 18, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 57 and read to the jury.

"I was informed of our competitors' price at the time this shipment was made. The price shown by this invoice is 2 cents a barrel less than the California mill price, due to the cash discount.

This is an invoice to the Tum-A-Lum Lumber Company for shipment to Gateway, dated August 19, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 58 and read to the jury.

"Gateway is in Central Oregon on the Bend branch. I was familiar with the price of our competitors at that point at the time this cement was shipped and sold. Our price was 10 cents under the Lehigh and 12 cents under the California mills.

This is an invoice to Miller Lumber Company at Bend, Oregon, dated August 24, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 59 and read to the jury.

"The price shown by this invoice is 10 cents under the Lehigh price and 12 cents under the California mills.

This is invoice to J. K. Irby at Kent, Oregon, dated September 4, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 60 and read to the jury. [292]

"Kent is on the Shaniko branch in Central Oregon; it is east of a line drawn down the Deschutes

(Testimony of C. T. W. Hollister.)

River and west of Umatilla. It is northeast of Roseburg and Drain. I was familiar with the price of our competitors at that place at that time.

This is an invoice to Miller Lumber Company at Bend, Oregon, dated September 5, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 61 and read to the jury.

"I was familiar with competitors' prices at the date this shipment was sold and placed. The invoice shows a price of 10 cents under Lehigh and 12 cents under California.

This was an invoice to Nottingham & Company for Kelso shipment, dated September 9, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 62 and read to the jury.

"I am familiar with competitors' prices at that time. This price is based on Portland, allowing Nottingham & Company 15 cents a barrel commission.

This is an invoice to the Concrete Pipe Works, at Vancouver, Washington, dated September 11, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 63 and read to the jury.

"I am familiar with competitors' prices at the time and place this cement was shipped and sold. The invoice shows a cut of 10 cents a barrel under competitors' price in Vancouver.

This is an invoice to the S. P. & S. Ry., Farrington, Washington, dated September 18, 1916."

(Testimony of C. T. W. Hollister.)

The same is introduced in evidence, marked Defendants' Exhibit 64 and read to the jury. [293]

"I cannot state definitely where Farrington is; it is in Eastern Washington.

This is an invoice to W. F. King, at Prineville, Oregon, dated September 18, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 65 and read to the jury.

"I am familiar with our competitors' prices at the time and place of this sale. This invoice shows a 10 cents per barrel cut.

This is an invoice to the Tum-A-Lum Lumber Company, Walla Walla, to be shipped to Maupin, dated September 18, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 66 and read to the jury.

"Maupin is on the Bend branch in Oregon. The Deschutes River splits Maupin in two, I think. It is west of Umatilla. I am familiar with competitors' prices at the time this cement was sold. I would have to examine my memorandum to state how this price compared with competitors' prices. I have been testifying from memorandum made by myself two or three weeks ago in the preparation of this case. This invoice shows a cut of 10 cents.

This is an invoice to the Maryhill Land Company, dated September 18, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 67 and read to the jury.

"This is an invoice to the Arlington Lumber Company, Condon, dated September 18, 1916."



(Testimony of C. T. W. Hollister.)

The same is introduced in evidence, marked Defendants' Exhibit 68 and read to the jury.

"I am familiar with competitors' prices at the time [294] and place of this sale. This invoice shows a cut of 10 cents.

This is an invoice to Murphy-Wann, at Marshfield, Oregon, dated September 19, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 69 and read to the jury.

"This is an invoice to Hancock, at Kelso, Washington, dated September 21, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 70 and read to the jury.

"This is an invoice to Nicholson & Hatfield at Elm, Washington, dated September 25, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 71 and read to the jury.

"This place is in the Grays Harbor country. The cement was sold to Nicholson & Hatfield but I gave Lebo a 10 cents a barrel commission on this sale. This sale was made at a price 2 cents below the market there.

This is an invoice to the East Oregon Lumber Company at Enterprise, Oregon, dated September 27, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 72 and read to the jury.

"Enterprise is on the Joseph branch of the O. W. R. & N. Co. in Eastern Oregon, almost at the extreme eastern boundary of the state. It is east of the Deschutes and east of Umatilla. I am familiar

(Testimony of C. T. W. Hollister.)

with prices of competing mills at the time and place this cement was sold. This invoice shows a price 10 cents under the California price.

This is an invoice to the Olympia Hardware Company, dated September 27, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 73 and read to the jury. [295]

"I am familiar with the prices of other mills at the time and place at which this cement was sold. This sale was based on \$1.62 Portland or Oswego against \$1.90 California. The California price is the price of the California mills in Portland, Oregon. I don't know how this price compares with the price the Washington mills were making.

This is an invoice to the Tum-A-Lum Lumber Company shipped to Moro, Oregon, dated September 27, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 74 and read to the jury.

"Moro is on the Shaniko branch, east of the Deschutes and west of Umatilla. I am familiar with the price of competitors at the time and place this cement was sold; the invoice shows a cut of 10 cents.

This is an invoice to Hancock, Kelso, Washington, dated October 6, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 75 and read to the jury.

"This is an invoice to J. K. Irby, Kent, Oregon, dated October 9, 1916."

(Testimony of C. T. W. Hollister.)

The same is introduced in evidence, marked Defendants' Exhibit 76 and read to the jury.

"This is an invoice to the Maryhill Land Company, dated October 10, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 77 and read to the jury.

"This is an invoice to Arlington Lumber Company at Condon, dated October 11, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 78 and read to the jury. [296]

"I am familiar with the price of competing mills at the time and place this cement was sold. The invoice shows a cut of 10 cents a barrel.

This is an invoice to the Tum-A-Lum Lumber Company at Ione, dated October 11, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 79 and read to the jury.

"Ione is on the Heppner branch; it is east of the Deschutes and west of Umatilla. I am familiar with the prices of competitors at the time and place at which this cement was sold. The invoice shows a cut of 10 cents.

This invoice is to Lebo, Aberdeen, Washington, dated October 13, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 80 and read to the jury.

"The invoice shows that this cement was loaded from Portland. We had cement on the wharves in Portland and it was loaded in Portland owing to there being a car shortage and we had brought cement in on barges to Portland.



(Testimony of C. T. W. Hollister.)

This is an invoice to the Olympia Hardware Company, dated October 14, 1916."

The same is marked Defendants' Exhibit 81, introduced in evidence and read to the jury.

"This is an invoice to Kleinschmidt Hardware, at Baker, Oregon, dated October 17, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 82 and read to the jury.

"This is an invoice to Pilot Rock Lumber Company, dated October 18, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 83 and read to the jury. [297]

"Pilot Rock is on the end of the Pilot Rock branch out of Pendleton; it is east of the Deschutes and east of Umatilla.

This is an invoice to the Tum-A-Lum Lumber Company, of Redmond, dated October 18, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 84 and read to the jury.

"I am familiar with the prices of competing mills at the time and place at which this cement was sold. The invoice shows a 10 cent cut.

This is an invoice to the Chehalis Material Company, dated October 18, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 85 and read to the jury.

"This is an invoice to the Tum-A-Lum Lumber Company at Lexington, dated October 18, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 86 and read to the jury.

"This is an invoice to J. S. Robb, Kelso, Washington, dated October 19, 1916."

(Testimony of C. T. W. Hollister.)

The same is introduced in evidence, marked Defendants' Exhibit 87 and read to the jury.

"This is an invoice to the Tum-A-Lum Lumber Company at Grass Valley, Oregon, dated October 19, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 88 and read to the jury.

"Grass Valley is on the Shaniko branch, east of the Deschutes and west of Umatilla. I am familiar with the prices of our competitors at the time this cement was sold. The invoice shows a 10 cent cut.

This is an invoice to Maryhill Land Company, dated [298] October 19, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 89 and read to the jury.

"This is an invoice to Enterprise M. & M. Company, dated October 20, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 90 and read to the jury.

"This is an invoice to the Maryhill Land Company, dated October 21, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 91 and read to the jury.

"This is an invoice to East Oregon Lumber Company, Enterprise, Oregon, dated October 24, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 92 and read to the jury.

"This is an invoice to the Oregon Lumber Company at Pendleton, Oregon, dated October 24, 1916."

(Testimony of C. T. W. Hollister.)

The same is introduced in evidence, marked Defendants' Exhibit 93 and read to the jury.

"Pendleton is east of the Deschutes and east of Umatilla. I am familiar with the prices of our competitors at that place at the time this sale was made. This sale was made at the same price at which the Lehigh was selling.

This is an invoice to Lebo at Aberdeen, dated October 27, 1916."

The same is introduced in evidence, marked Defendants' Exhibit 94 and read to the jury.

"I prepared a memorandum showing total shipments of the Oregon Portland Cement Company from the time of the first shipment to the 27th day of October. I would have to use the memorandum in order to testify regarding this. [299] This is the memorandum which I made. It is a recap of the invoices which shows the net prices we got at our mills. I know that there was a published price list, published by competing mills. The Santa Cruz and the Pacific Portland Cement Companies printed theirs. I saw such price lists while I was acting as assistant manager in Portland; there was nothing secret about them. They were easily obtained. Here is a price list of the Golden Gate cement, Pacific Portland Cement Company, a California concern. It was in use around Portland at the time Oregon Portland Cement Company started selling here."

The same was marked Defendants' Exhibit 95 and introduced in evidence.



(Testimony of C. T. W. Hollister.)

“I have made a search of the records of the Oregon Portland Cement Company and ascertained the number of shipments and the place of shipment from the first shipment of cement made by this company to the 27th day of October. This is a copy from my record (and the witness produces a paper). It is taken from the records of the office of the Company. I know the records to be correct. From June 9th to October 27, 1916, we shipped 80,738 $\frac{3}{4}$  barrels. This paper also shows how many barrels were shipped outside of a zone or territory bounded by the Columbia River on the north, a line drawn by the Deschutes River on the east and Drain on the south. 8838 $\frac{1}{4}$  barrels were shipped in that period to points without that zone. There were altogether 64 shipments without that zone in that period. We shipped to 31 towns outside of that zone and we shipped to 36 towns within that zone. I was familiar with the freight rates on cement during the summer of 1916. From the time the Oregon Portland Cement Company began shipping, the freight rate from [300] the western Washington mills and the freight rate from the Oswego mill at a point just the other side of Vancouver, Washington. We had a 6 $\frac{1}{2}$  cent rate into Vancouver, Washington; beyond Vancouver our rate was 8 $\frac{1}{2}$  cents in June, 1916. We had an 8 $\frac{1}{2}$  cent rate as far north as Seattle and Tacoma. The rate at all points in western Washington south of Olympia and including Olympia to a point just outside of Vancouver was the

(Testimony of C. T. W. Hollister.)

same from the western Washington mills and from our mill, and we were on an equal basis with the western Washington mills to Aberdeen and Hoquiam, a 10 cent rate. At Tacoma the western Washington mills had a 5 cent rate against our 8½ cent rate up to July 1, 1916. After July 1, 1916 our rate became 10 cents to Seattle and Tacoma and intermediate points, taking in Aberdeen, Hoquiam and the Grays Harbor country. The western Washington mills' rate to Olympia and points south of Olympia, taking in Aberdeen, Hoquiam, Centralia, Vancouver and Portland became 10 cents. The western Washington mills' rate to Seattle and Tacoma was 5 cents. The rate of the eastern Washington mills was the same as our rate at Echo, Hermiston, Stanfield and Pendleton and points east of Pendleton on the O. W. R. & N. road to Huntington. We picked up the Irwin, Washington rate near Echo and Stanfield and east of those points our rates were on a parity with the Irwin mill, including points on the Wallowa, a line running from LeGrande to Enterprise and Joseph. There was no business or market for cement east of Baker. There was no change in the freight rates from Portland east. On the branch line of the O. R. & N. running south from the main line the rates from Bellingham and Concrete and Irwin and Metaline were higher than the rates from Oswego. The western Washington mills and the [301] eastern Washington mills had the same rate into that country. On the lines south from

(Testimony of C. T. W. Hollister.)

Portland rates from California and rates from Portland met approximately at Ashland near the California line. The road from Spokane to Portland represented by Mr. Skinner was the S. P. & S. This is the same line running from Portland to Astoria. The rate from Oswego to Astoria was 7½ cents from Portland and 2½ cents to Oswego from Portland, making a 10 cent rate."

Thereupon the defendants by their attorneys, offered to show the distance from Spokane to Portland and the distance from Portland to Astoria over the S. P. & S. Railroad, and also to show the freight rate from the Oswego mill on the S. P. & S. railroad to Salem and the lines controlled by the S. P. & S. as far as Albany, Corvallis and Eugene, and the distance from Portland to these points, for the purpose of showing that the rate which the United States wished the S. P. & S. Railroad, through W. D. Skinner, to put in for the transportation of cement from Irwin to Portland, was discriminatory when compared with the rates charged by the same Railroad Company from the mill of the Oregon Portland Cement Company to other points on the lines of the same railroad company, but the Court sustained an objection to the introduction of said evidence and to this ruling of the Court the defendants excepted and the exception was allowed.

Upon cross-examination the witness testified:

"We could ship to Ashland with a freight rate within ¼ of a cent of that paid by the California



(Testimony of C. T. W. Hollister.)

mills from their mills to Ashland. North of Ashland the rate from the California mills was higher than the rate from Oswego until you reach a certain point and from that point there is a blanket rate that covers every point north of that particular [302] point. This rate was advantageous to the California mills. Freight rates in the territory north of Ashland were in our favor as compared with the California mills. Freight rates from the Oswego mill into central Oregon, that is to say branch lines running south from the Columbia river, were in favor of the Oswego mill as against the Washington mills. There was a parity of rates with the Spokane mills at Hermiston, Stanfield, Pendleton and east of Pendleton to Huntington. Up to the first of July we were on equality rates with the western Washington mills from a point just north of Vancouver to and including Olympia, Aberdeen and Hoquiam and had a lower rate a little way north of Vancouver, a few miles. After the first of July this freight rate in this territory was advanced from 8½ cents to 10 cents, applying both from Oswego and from the Washington mills. We had the same rate to Seattle that the western Washington mills had to Portland. When the raise was made the raise was the same for the western Washington mills and for the Oswego mill. After the first of July it cost 10 cents to ship to Olympia or to Aberdeen and Hoquiam and it cost the western Washington mills the same to ship from their plants to these points and it cost the

(Testimony of C. T. W. Hollister.)

western Washington mills the same to ship to Vancouver, Washington. When the  $8\frac{1}{2}$  cent rate was in force it was practically a Portland and Seattle rate working both ways and this was also true of the 10 cent rate. We had a better rate to Vancouver; our rate to Vancouver was  $6\frac{1}{2}$  cents and it continued at this. The rate changed from  $6\frac{1}{2}$  cents to  $8\frac{1}{2}$  cents before the first of July somewhere near Woodland, just outside of Vancouver and after the first of July the  $6\frac{1}{2}$  cent rate changed to 10 cents at practically the same place. We did not have equal or [303] better rates from a railroad standpoint than our California or Washington competitors in the entire state of Oregon. The California mills loading out of Portland had a 10 cent better rate than we had loading out of Oswego. Ten cents means 10 cents a barrel not 10 cents a hundred; it is equal to  $2\frac{1}{2}$  cents a hundred. In all the Oregon territory we had as good or a better rate from a dollar and cents standpoint as any California or Washington company from their mills, but not a better rate from a railroad standpoint and considering mileage. If a contractor is hauling by truck he figures distance very closely, but when he is paying freight upon cars he figures only the freight per ton which he pays. On direct shipment by rail from the producing point, leaving out of consideration the  $2\frac{1}{2}$  cent a hundred rate from Oswego to Portland, our company enjoyed an equal or better freight rate in the state of Oregon by rail carriage over California or Wash-

(Testimony of C. T. W. Hollister.)

ington companies from their mills, and we also had a better rate for Vancouver, Washington, and were on equal footing with the western Washington mills in western Washington to and including Olympia, Aberdeen and Hoquiam. We also had the same freight rate from Portland to Tacoma and Seattle which the western Washington mills had from their plants to Portland or Vancouver. When I said on my direct examination that the California mills had an advantage of 10 cents a barrel in freight rates as against the Oswego company, into the central Oregon country, I was speaking of their rate from Portland as compared with our rate from Oswego, as our rate into central Oregon was the rate out of Portland plus the Southern Pacific's charge from Oswego to Portland. This charge of the Southern Pacific was  $2\frac{1}{2}$  cents a hundred or 10 cents a barrel. I think the steam schooner rate from [304] California to Portland was \$1.50 or \$1.75 a ton; figuring roughly there are five barrels of cement to the ton, that would be  $7\frac{1}{2}$  cents a hundred or 29 cents a barrel; that was the rate by water. It cost the California companies about 12 cents a barrel freight to take their cement from their mills to the wharves in California. In San Francisco, they had free wharfage. I think this rate, 12 cents a barrel, covers the entire labor charge in California for taking cement from the mills and putting it into the boat at the wharves. I think it cost the California companies 42 cents a barrel to put their cement into



(Testimony of C. T. W. Hollister.)

Portland and in Portland they had a loading charge and piling charge running at approximately 8 or 10 cents a barrel so the California cement in Portland started with a 50 cents a barrel handicap in the matter of freight and handling. The mill at Oswego was built there to take advantage of the Portland market and we had to bring our raw materials from Roseburg and Dallas in addition to paying the 10 cents a barrel to get the cement from Oswego to Portland. The cost of transporting raw materials from the quarry to the mill is a part of the cost of manufacture. When manufactured the California cement came into Portland with a charge of about 50 cents against it for freight and handling, 50 cents a barrel, and our cement came into Portland with a charge against it of 10 cents a barrel for freight. When I testified about a zone on my direct examination I made a notation of distances outside of this imaginary zone and gave the total number of barrels shipped outside the zone and the total number of barrels shipped inside the zone. I did not make any classification based upon a line running through Umatilla nor did I made any classification excluding the branch lines running south from the Columbia river. I included in my classification shipments [305] consigned to the S. P. & S. Ry. Company. These sales to this railroad were made through the railroad's purchasing agent. I don't know who he was in 1916; I think it was Mr. Clark, the same man who has been on the witness

(Testimony of C. T. W. Hollister.)

stand. We billed to the North Bank Railroad in Portland and they took it wherever they wished to. I did not figure how many tons of cement we shipped into central Oregon. This classification was made by myself. It was an idea of my own for the purpose of aiding the defense in this case. Our total shipments between the 9th of June and the 27th of October, 1916 was  $80738\frac{3}{4}$  barrels and of that there was shipped outside of the zone which I defined  $88381\frac{1}{4}$  barrels.  $42167\frac{3}{4}$  barrels were shipped to Portland. There were shipped to towns outside of Portland within this blanket zone  $29732\frac{3}{4}$  barrels, so that inside the zone  $71900\frac{1}{2}$  barrels were shipped. If the eastern limit of that zone were extended from the Deschutes river to Umatilla I cannot say what difference that would make in my totals. The shipments that I have testified to as having been made outside of the zone, cover all the invoices which I introduced here. In the first part of August I was in Portland and north; in the latter part of August I was in eastern Oregon, returning to Portland about the first of September. I couldn't say whether I was in Portland on the 29th of August or not. I was transferred from the manager of the office of the sales department to a place on the road the latter part of July or the first of August at my own request. At all times I had unlimited discretion to decide things on my own judgment. In August and September I did not have entire discretion as to the sales policy of the Company; I

(Testimony of C. T. W. Hollister.)

would consult with Mr. J. E. Moore and after I was transferred to the road I reported to [306] Mr. J. E. Moore. I heard of the racket going on in the Board of Directors during June, July and August. I did not know anything about the nature of the charges that were being made. I cannot tell you definitely when I learned about them. I think I heard of the telegram sent by J. E. Moore to Clark Moore at Denver dated August 29, 1916 which has been offered in evidence, but heard of it afterwards. I doubt if I heard of it at the time; I possibly heard at that time or about that time that some complaint was made because our company was not selling in Washington, I didn't know much about it, however. It was not my business to establish an agency at Vancouver or was such matter within my discretion. I couldn't tell you who had the discretion to do this. The price list published by the Golden Gate Cement Company, offered in evidence by me, does not show prices Enterprise and Prineville, Oregon. I worked out that price on the \$2.30 basis Portland. There was no rail line running into Prineville in 1916. In giving the price at Prineville I based it on f. o. b. Redmond and the haul across in trucks to Prineville. I did testify that I cut our competitors' prices at both Prineville and Redmond and I worked out our competitors' price on the basis of our competitors' price at Portland plus freight. I made the memorandum from which I was testifying two or three weeks ago. The sale



(Testimony of C. T. W. Hollister.)

about which I was testifying was made June 23, 1916, invoice number 13. I made this up within the last two or three weeks to use upon this trial; it was my own idea entirely. The red figures under the name I put on to show where Culver was located; it means 117 miles east of the junction of the Deschutes and Columbia rivers. It says south-east yes it is south, it is 117 miles down the Bend branch." [307]

Thereupon the memorandum from which the witness had been testifying was introduced in evidence by the United States, marked Plaintiff's Exhibit 155. I made a memorandum of the competitors' prices on practically all of these invoices. I did not say anything about competitors' prices to the Spokane, Portland & Seattle Railroad. I didn't make any memorandum about that but showed only the net price. I made no memorandum showing competitors' prices at Dayton, Washington; I made no memorandum showing competitors' prices from the Washington mills at Aberdeen, Hoquiam or Chehalis. I testified that in the southwestern Washington territory at that time the Washington mills had a sack allowance of 7½ cents. Examining Defendants' Exhibit 25 that is dated June 19, 1916, early in the year 1916 they had a 10 cent sack allowance; the latter part of the year they had a 7½ cent sack allowance. The 10 cent sack allowance of the Washington mills covered Vancouver, Washington. I cannot say about Ridgefield or Woodland or Kalama. At Kelso the 7½

(Testimony of C. T. W. Hollister.)

cent sack allowance applied the latter part of the year 1916; the first part of the year it was 10 cents there. When I said latter part of the year I meant along about August and September when they went to a 7½ cent sack allowance. I judge it was the same at Castle Rock. I met Clark M. Moore in Portland at the Hotel a little after the middle of April, 1916, and he reinstated me in the sales department. About the first of April, 1916 I was ordered to report to Mr. Newlands by Aman Moore, and did so and went to work under Mr. Newlands' direction in the operating department. No explanation was made to me about my transfer at that time. Yes, Aman Moore told me that Mr. Butchart didn't want me in the sales department. I don't remember [308] that Mr. Newlands made any explanation; I did not ask him about it. I don't remember that I asked any questions; I had no curiosity why my services in the sales department were not satisfactory. I have been a salesman off and on for about twenty-five years. I asked Aman Moore why my services in the sales department were not satisfactory and he wouldn't tell me. I took an order from Walther-Williams at The Dalles in March. There is some question whether I took an order from Kleinschmidt. I have never been able to work that out satisfactorily. I am unable to say definitely whether I took the order from Kleinschmidt or not; I don't remember taking any orders on that trip in March, 1916 except the order from Walther-Williams. I

(Testimony of C. T. W. Hollister.)

was a witness upon the former trial of this case. If the record shows that upon the former trial of this case I testified that upon this trip to eastern Oregon in March, 1916, I didn't solicit or obtain orders for cement I must have so testified. I didn't see Mr. Crawford in Walla Walla at that time or on that trip. I expected to see him at Pendleton but I think Mr. J. M. Crawford was away. I recognize the writing which is shown to me; it is in my handwriting. The last paragraph of the letter contains advance information but I didn't go, changed my mind after I wrote that letter. I think Mr. Crawford was away; I am not positive. He has a brother-in-law in Pendleton. I saw a salesman of the International Portland Cement Company while on that trip. His name is Clarence R. Smith. This letter which you show me is in my handwriting. In it I say 'I then saw Mr. Kleinschmidt and have taken his order for one car, his order herewith.' I have never been able to find a copy of his order. I should not say whether I took it or not. When I wrote it I wrote the truth, I think, [309] and was speaking the truth, but I cannot remember the incident at all."

Thereupon three pages of the letter dated "La Grande, Oregon 3/8/16" produced by the Government of the United States with also memorandum written at Baker, 9th, were offered in evidence marked Plaintiff's Exhibit 156 and read to the jury.



(Testimony of C. T. W. Hollister.)

“I don’t doubt now that I took the order mentioned in those letters.”

Thereupon the witness identified a further letter dated Pendleton, March 3, 1916, as having been written by him and the same was introduced in evidence marked Plaintiff’s Exhibit 158 and read to the jury.

“I do not remember taking this order for a car of cement from the Oregon Lumber yard. Upon the trip made in March I took an order from Walther-Williams at The Dalles for a carload of cement. The Oregon Lumber Company at Pendleton is not the same as the Tum-A-Lum Lumber Company at Walla Walla, Washington. Some parties connected with the Tum-A-Lum owned the Oregon Lumber Company at Pendleton. Mr. J. M. Crawford and his brother-in-law, Mr. Cox and possibly one other member of the Tum-A-Lum Lumber Company owned the Oregon Lumber Company. After I returned from Pendleton on the trip in March, 1916, I was relieved from the sales department. I don’t remember very distinctly what Mr. Aman Moore said but something to the effect that Mr. Butchart requested that I should leave the sales department. My attention is called to the Plaintiff’s Exhibit 97. No explanation of that situation was made to me at that time to my knowledge. I cannot say what I had been doing that I ought not to have done in Walla Walla, Washington, Baker, LaGrande and Pendleton, Oregon. Mr. Clark M. Moore did not make any explanation when I was

(Testimony of C. T. W. Hollister.)

transferred [310] back into the sales department. I didn't ask any explanation; I was glad to go back. I identify Plaintiff's Exhibit 145. I wrote that letter and made the pencil memorandum in the corner. It was written May 4, 1916, after I was transferred back into the sales department and addressed to the Auburn Furniture & Hardware Company, Auburn, Washington. This letter was written after Mr. Clark Moore became sales manager. I don't know of any different instructions being given by Mr. Clark Moore than those which I had received from Mr. Aman Moore with respect to selling cement of the Oregon company. Each cement company can learn quite readily the prices made by any competing company. I will not admit that they sent their price lists to each other but we pick them up. I never personally received any price lists from any of our competitors. If I said that competitors sent to other cement companies their price lists then I was mistaken. There is no difficulty about finding out prices of competitors and I think it entirely proper for a cement company to write to its competitors and ask the prices they were quoting. I cannot say whether that is the practice or not but it is perfectly proper. I put in the evidence yesterday the price list of the California Company which sells Golden Gate cement. This is the Pacific Portland Cement Company. I got this price list from this company; I asked for it. The pencil memorandum on Plaintiff's Exhibit 145, to which my attention is called, was made by me and

(Testimony of C. T. W. Hollister.)

was addressed to Mr. Clark M. Moore. I thought possibly through a friend the Washington company desired to ascertain what our policy would be and what our prices would be, etc. From a selling standpoint I don't go on the quotation blank, I like to see an invoice. When our company first started we threw quotation blanks out every [311] thirty days or six weeks. I don't care anything about a quotation blank. What I wish to see is an invoice and I get that through a friend. I remember the telegram sent by J. E. Moore to his brother on the 29th day of August, Plaintiff's Exhibit 134. I don't know whether I really knew of that telegram at the time or before that; I don't remember. If the testimony shows that upon the former trial of this case I testified that I remembered the telegram and that I must have seen it I testified as the testimony so shows and I say now that in all probability when I went to Washington on the second trip I had seen that telegram, but I am hazy on that question. The second trip to Washington was made I think upon instructions of Mr. Clark M. Moore. I think there is a letter on record here but I cannot tell you the date of it. I think I made the sale to Esterday about which I testified in September. I cannot say where I made the sale. I called on Mr. Esterday a number of times at his office in Portland. I had not been able to sell to him prior to that sale. I am not sure that I made sales on my first trip into Washington in August. I gave Lebo a commission of 10 cents a barrel on



(Testimony of C. T. W. Hollister.)

the sale which was made at Elm. I cannot tell when this commission was paid; I don't know. There was a controversy between Lebo and our company about this commission. It was passed up to me and I decided that we should give him a commission. I cannot say whether the company objected to paying the commission or not. When I went into Washington I cannot tell you whether I took the communications that had come into the office from various points in Washington. I did not go to Seattle or Tacoma; I went to Aberdeen. I cannot remember that I called upon the Aberdeen Manufacturing Company. I went to Centralia; I do not recall calling upon [312] the city purchasing agent at Centralia. I don't remember Mr. J. Hughes at Centralia. I went to Chehalis; I did not call on the Chehalis Brick & Tile Company to my knowledge. I went to Olympia; I called on the Olympia Hardware Company, I think on my first trip. If Exhibit 136, letter from J. E. Moore to Clark M. Moore refers to my trip into Washington and says that I made no sales on this trip, the statement is true."

Upon redirect examination the witness testified:

"Sales to the S. P. & S. were included in the cement shipped outside of the zone delivered at the depot here but billed to destination. We would make out the shipping receipt and the bill of lading to the point in Washington for which it was destined. Schooner rates on cement from San Francisco to Portland are not published; I do not

(Testimony of C. T. W. Hollister.)

know what the schooner rates are. The figures which I gave were from hearsay. The steam schooners gave them special rates. The published rate from San Francisco to Portland was 7½ cents a hundred including unloading cement from cars over the wharf into the steamer at San Francisco, transporting from San Francisco or Bay points to Portland, unloading the steamer at Portland and placing and piling cement on the dock and free dockage for five or six days or over. Where a shipment was made to Corvallis or interior points the rate includes loading on the cars. All orders given by the Tum-A-Lum Lumber Company were received directly from Walla Walla. Orders from the Oregon Lumber Company are received from the Oregon lumber yard at Pendleton. Invoices for shipments to the Tum-A-Lum Company are forwarded to Walla Walla and payment made from there. Invoices for goods shipped to the Oregon Lumber Company at Pendleton are sent [313] to Pendleton and payments are made from that point. Examining again the Government's Exhibit 156, the letter from me written from the Geiser Grand Hotel at Baker, Oregon, March 9th with reference to the Kleinschmidt order, these letters are new to me; they are in my handwriting but I have no recollection at all of being in our files. I have never been able to find the order from Kleinschmidt Hardware Company in our files. I don't know who received the letter in Portland. Aman Moore had private files in the office in which he put certain corre-

(Testimony of C. T. W. Hollister.)

spondence. I have no recollection of seeing this letter while I was in the cement office nor of seeing the order. Examining the Government's Exhibit 157, letter from La Grande, Oregon, dated March 8, 1916, referring to an order from Kivette, I don't remember anything about this letter or seeing it in the files. I don't remember seeing any order from Kivette in the files. I did not make any list of papers taken by the Government from the files of the Oregon Portland Cement Company. I cannot tell whether any such list was made. Referring to Government's Exhibit 158, a letter from Pendleton dated March 3, 1916, referring to order of the Oregon Lumber yard, I don't recall this letter and I don't remember the order. These letters are addressed to Oswego. The Cement Company first opened its office in Portland during the latter part of May, 1916. I don't know who moved the files in. I had something to do with the organization of the new sales office. I don't know whether any effort was made to go through the sales files at that time. I never received from Mr. Clark M. Moore any instructions limiting me to the territory in which I should sell cement. I never received from Mr. Clark M. Moore any instructions with reference to my quoting higher [314] prices than competitors quoted in certain territory or any instructions confining me in my quotations to prices quoted by my competitors. I said that I do not go on quotations, that I want an invoice. The general quotation list is not followed by salesmen closely. In-



(Testimony of C. T. W. Hollister.)

formation given by one cement company to another does not contain cut prices but the list prices. In making sales I do not follow our general quotations. I think I first met Mr. Butchart in 1917. I don't recall meeting him in 1916 at all. Mr. Butchart has never issued an order or suggestion to me regarding sales. I never received any letters from Mr. Butchart or the Oregon Portland Cement Company with reference to limiting the territory in which I should sell or the prices at which I should sell or anything of that kind. I am familiar with the situation in Portland and Oswego in the spring and summer of 1916 with regard to the car supply. We had trouble in obtaining cars for loading out our material, were compelled to load on barges and trucks and transfer cement to Portland. We loaded out a number of barges and to do this had to truck the cement from the mill to the water front. We had no physical connection at that time between the mill and the water front so we loaded our cement at the mill on carts and hauled it to the water front, loaded it on barges, brought the barges into Portland and unloaded them at the wharves. I continuously made verbal requests upon the railroad people for car services and the Company made requests in writing. I made my verbal requests to the traffic department or the operating department of the Southern Pacific and also tried to get cars from the S. P. & S. and tried to get cars through the Portland yards for delivery to the Southern Pacific. One carrier would hesitate to [315] de-

(Testimony of C. T. W. Hollister.)

liver cars to another on account of the cars disappearing. This same condition existed between the O. W. R. & N. and the Southern Pacific. This car shortage condition has always existed since we have been running at Oswego. We hauled cement into Portland in open cars and bought tarpaulins to cover the cement to protect it against the elements. We hauled cement in auto trucks in order to get our cement on the market, due to the car shortage. On the main line of the O. W. R. & N. we were on equal basis so far as freight rates were concerned with Irwin from Stanfield east to Huntington. Our tariff didn't apply to Union but only to Union Junction. The Irwin tariff applied to Union, but we had to pay switching from Union Junction to Union. Also from Pendleton running north from Spokane our rate was 2 cents higher to the state line or' to Walla Walla than the rate of the Irwin mill. On the branch line running out from La Grande to Enterprise our rates were the same as the Irwin mill. There is also a little line out of Pendleton to Pilot Rock and we had the same rates on this line as the Irwin mill had."

On recross-examination the witness testified:

"I cannot recall now what orders we refused to ship into Washington because we had no cars in which to ship. I didn't make any tabulation of it because I didn't think of it. I cannot say that this same point was raised on the last trial. At this time I cannot recall any order that our company rejected in 1916 prior to the date of the indictment

(Testimony of C. T. W. Hollister.)

because we couldn't get cars. The general quotation list sent out by a cement company is not followed closely by its salesmen. In my testimony regarding cuts on our published quotation list, cuts under the California companies' [316] prices, I base these cuts upon the published quotation list. I do not know what the salesmen for those companies were quoting at those places. The letters from Baker, La Grande and Pendleton in March, 1916, which have been shown to me are in my handwriting. I wrote them I should judge on or about the dates they bear. I cannot say that they were written from the places shown upon the letters or shown by the letter-heads. Sometimes I took a letter-head at one place and would write the letter at some other place. There has been no forgery or alteration or tampering with the letters that I know of; I wrote the letters and I don't see any alterations on them."

Upon redirect examination the witness testified:

"I cannot tell anything about what was in the balance of the letter which is incomplete. I am identifying only that part which is shown to me and which is in my handwriting."

### **Testimony of F. W. Erlin, for Defendants.**

Thereupon F. W. ERLIN, called as a witness on behalf of the defendants, testified as follows:

"I know R. P. Butchart and have known him from 8 to 10 years. I did not have any agreement or understanding with Mr. Butchart in the winter



(Testimony of F. W. Erlin.)

of 1916 or the spring of 1916 or any other time in California or at any other place in regard to where the product of the Oregon Portland Cement Company's mills should be sold or in regard to where the product of our mill should be sold; I mean by that the territory in which it should be sold. Neither at that time nor at any other time did I have any understanding or agreement with Mr. R. P. Butchart in regard to the prices at which the product of the Oregon Portland Cement Company should be sold or the prices at which the product of our [317] mill should be sold."

Upon cross-examination the witness testified:

"At no time did I have any understanding with anyone about the price at which I should sell our cement. I wrote the letter addressed to the Portland office which has been offered in evidence inquiring about whether they should quote Bellingham \$2.40 in which I said that inasmuch as I understood that the Washington price at Bellingham was \$2.30 it was quite in order for our Portland office to quote \$2.40 at Bellingham."

### **Testimony of R. P. Butchart, for Defendants.**

Thereupon R. P. BUTCHART, one of the defendants, called as a witness, testified on behalf of the defendants as follows:

"Q. Mr. Butchart, you are one of the defendants? A. Yes, sir. Q. Now, Mr. Butchart, Mr. Aman Moore testified in this case regarding certain conversations which he had with you, or which he

(Testimony of R. P. Butchart.)

claims to have had with you in April, 1916, between the dates—he doesn't identify the dates accurately—April 10th, 11th, 12th, 13th and 14th, at the time that you came here from California, and in his testimony he says this: 'He—speaking of yourself—'arrived April 11th following. Q. April 11th, following that? A. Yes, sir. Q. And upon his arrival or shortly after, did you have any discussion with Mr. Butchart as to the reason why he was displeased with Mr. Hollister soliciting business for the Oregon Portland Cement Company?' He answered 'Yes.' I wish you would tell the jury whether you had any discussion during that period, in Portland or Oswego, or anywhere, with Mr. Aman Moore, in regard to why you were displeased with Mr. Hollister soliciting business for the Oregon Portland Cement Company? A. No, sir. Q. He further testified [318] as follows: 'What, if anything did he say to you on that subject? A. Why, he said they had had a meeting in San Francisco during the week of March 17th to 25th; the Washington manufacturers were present, and the California manufacturers, and they had agreed to limit the territory of the Oregon Company. They were not to ship east of Central Oregon; they were to ship into Central Oregon, but not east of Umatilla.' I will ask you to state whether you had any conversation of that character with Aman Moore at that time, or at any time, in Portland or Oswego, or elsewhere? A. No, sir. Q. He further testified as follows: 'What is the fact, Mr. Moore, as to wheth-

(Testimony of R. P. Butchart.)

er anything was said at that time about any representation or statement that may have been made in San Francisco to Mr. Butchart, by the Washington cement makers, as to what Hollister had been doing?' His answer is: 'Mr. Rogers, of the Spokane, or Metalline Falls Company, had made a bitter protest to Mr. Hollister invading the Spokane territory by quoting Walla Walla, Pendleton and Baker, in other words, beyond Umatilla, the point where the Oregon people were to participate, and that I had committed the great offense of having the freight rates reduced so we could ship in there.' I would like you to state whether you made that statement or used any language of that character? A. No. Q. At that time or that place, or elsewhere, then or any other time? A. None whatever. Q. He further testified as follows: 'Did Mr. Butchart make any further explanation to you why he didn't want Mr. Hollister to solicit business for the company at that time? A. Why I was soliciting business for the company. It was only in that particular territory where he had been soliciting business; in territory outside of where the Oregon Company was to do business.' [319] Now did you make that statement or any statement of that character to Mr. Aman Moore, during that time, at Portland, or Oswego, or any other time, or elsewhere? A. No. Q. On his cross-examination, as I recall, Mr. Butchart—I haven't that here—he testified in substance as follows: that you told him in one of these interviews which you had with him, either in



(Testimony of R. P. Butchart.)

Portland, Oregon, or at Oswego, between the 10th of April and the 14th day of April, both dates inclusive, no one being present except yourself and himself, that you had made an agreement with the California cement manufacturers and the Washington cement manufacturers, or some of them, to the effect that the product of the Oregon Portland Cement Company's mill in Oswego should be sold only within a territory limited by the Columbia River on the north by a line drawn either through the Deschutes or Umatilla on the east, and by a line on the south drawn somewhere between Drain and Roseburg; or, we will say, as far south as Roseburg. I will ask you to state to the jury whether you at that time or place, or at any of those times or places, or at any other time or place, made any such statement to Mr. Moore? A. Never. Q. Are you personally acquainted with Mr. Rogers of the Metalline Falls Company? A. No, I wouldn't know Mr. Rogers, to see him. I have heard of Mr. Rogers. I wouldn't know him. I have no recollection of meeting him."

**Testimony of L. C. Newlands, for Defendants.**

Thereupon L. C. NEWLANDS, called as a witness on behalf of the defendants, testified as follows:

"I was superintendent of the Oregon Portland Cement Company at Oswego in 1916; am not at present. I first became superintendent about the 23d of December, 1915, and took office on the first of January, 1916. Raw material for [320] this

(Testimony of L. C. Newlands.)

plant must be hauled a long distance, a much longer distance than is ordinary with most cement plants. The lime rock comes from Roseburg or near Roseburg and the cement rock from near Dallas, Oregon. The haul from Roseburg is about 200 miles and from Dallas is about 65 miles. The cost in cents per barrel ranged from 22 cents to 26 cents per barrel of manufactured cement. It takes from 600 to 612 pounds of the mixture of lime rock and cement rock to manufacture a barrel of cement. Beside the lime rock and cement rock we use fuel oil for burning and later add three or four per cent of gypsum to the finished cement, in grinding. The freight rate on the raw material, the lime rock from Roseburg and the cement rock from Dallas, cost us from 22 to 26 cents a barrel, the variation being due to the various proportions in which the two are mixed. The fuel at that time cost 19 to 20 cents a barrel. I have calculated accurately the cost of cement at our plant in Oswego, Oregon, when ready for market. The cost of cement cannot be figured over a short period. It is unfair to take the cost for one month for you might have a very good run one month and the next month to shut down for an extended period of time or you might have a break down which would increase your cost. I have figured the cost for the operation of our plant from June 1st to November 30th, 1916, November 30th being the end of our fiscal year. My estimates are based on the actual cost to us of manufacturing and enter into our balance sheet, and have been passed

(Testimony of L. C. Newlands.)

on by the Internal Revenue Department in our estimate of taxes, etc. The total cost per barrel was approximately \$1.75, \$1.75 and a fraction. I have not included in this estimate any interest upon the capital invested but the actual cost of manufacture. I did include depreciation. [321] I have included all charges but made no allowance for interest on the investment. 105304 barrels cost, without depletion or other charges of that kind \$1.1886. To that has been added depletion at 8 cents a barrel; that is part of the cost. By depletion I mean the depletion of our supply of raw material; it is a charge which is allowed by the Internal Revenue Department. I have given you the actual factory cost."

Thereupon defendants offered to show by this witness what was the reasonable cost of putting up this mill in 1915 and 1916 and claimed that the cost or value of the factory is a proper element to take into consideration in ascertaining the cost of the manufactured product. The United States, by its attorneys objected to the introduction of any evidence of this character and the court sustained the objection and thereupon the defendants excepted and the exception was allowed.

"My attention has been called to a suggestion from Mr. McDonald that I have given the wrong figures. The net loss we sustained during that period June 1st to November 30, 1916, was 14.24 cents a barrel. I think this is probably what Mr. McDonald meant, the difference between our selling price and the cost of manufacture to us. I have

(Testimony of L. C. Newlands.)

been in the cement business about 14 years, during the greater part of that time in the manufacturing end of it. There has been no meeting of the executive committee of the Oregon Portland Cement Company, the committee provided for by the by-laws as Mr. Aman Moore testifies. I never received any notice of any meeting of the executive committee. I came to Portland on the 28th of December, 1915. Mr. Butchart was not here at that time and was not here from that time until early in [322] April, 1916. During that time he was in Toronto and in Denver and in Chicago I know for I corresponded with him. I met him upon his arrival here in April, 1916, at the Portland Hotel. I met Mr. Butchart and his wife and had breakfast with them. As we left the dining room Aman Moore was in the lobby of the hotel. I was not present at any conversation had between Mr. Butchart and Mr. Aman Moore at the hotel except their first greeting. Mr. Butchart came to the factory either the same day or the succeeding day. Aman Moore was with him in my presence at the factory during that visit. Aman Moore was at the factory at Oswego when Mr. Butchart came. Aman Moore was living near the factory at that time. Mr. Butchart and Aman Moore had more or less talk which was almost entirely in my presence. Mr. Butchart was not out of my presence for more than a minute during the whole time he was at the factory. During that trip he made but one visit to the factory. I did not hear any conversation between



(Testimony of L. C. Newlands.)

Aman Moore and Mr. Butchart at the factory in regard to the appointment of Mr. Clark Moore as sales manager. There was no talk between Mr. Aman Moore and Mr. Butchart in my presence at the factory in regard to where the products of the mill should be sold. There was no talk between Aman Moore and Mr. Butchart in regard to prices which should be charged for cement. There was no talk between Mr. Butchart and Aman Moore in my presence or within my hearing in regard to any agreement between Mr. Butchart and the Washington and California manufacturers of cement or any of them. At that time the Oregon Portland Cement Company did not have any office in the city of Portland. This office was established late in May. I went around with Mr. Butchart upon his visit here in April to look at offices and see which would be suitable. I may have called on Mr. Butchart later [323] at the Portland Hotel, that is not clear in my mind. I did not see him at the Portland Hotel in the presence of Aman Moore at any other time during that visit. I rather think Mr. Butchart was at the meeting at which Clark M. Moore was made sales manager; I am not sure. I think he left after that meeting which was held on the 14th of April. He remained in Portland a very short time if at all, after that meeting. I cannot state just when he went away. After that visit in April Mr. Butchart came to Portland in June, 1916, I think. He was not here more than a day or two at most. There was a meeting of the directors

(Testimony of L. C. Newlands.)

to be held on the 10th of June, 1916. He was here about that time; I cannot say whether he was here on the day the meeting was to be held or not for the meeting was not held. After that visit in June Mr. Butchart was here for four hours one evening. I think that was late in August. I saw him in our office in the Wilcox Building that evening. No one was there but Mr. Butchart, Mr. MacDonald and myself. I am sure Mr. Clark M. Moore was not there and that Aman Moore was not there. I do not think Mr. Butchart was in Portland again until the following year. During the period from January 1 to April 1, 1916, Mr. Butchart gave very little direction or control to the business of the Oregon Portland Cement Company. I was a director during that time. During the period from April 14th at which time Mr. Clark Moore was made sales manager, and June 10th, Mr. Butchart gave practically no attention to the affairs of the Oregon Portland Cement Company. My own orders from time to time were very few and far between. I was a director and a member of the executive committee during that period and a member of the executive committee until it was abolished. From June until Mr. Butchart came to Portland [324] some time in August, when as I have said he was here but a few hours, he gave no direction to the affairs of the company. He was in the east at that time. He gave no direction from the time he was here the few hours in August, 1916 to the date upon which this indictment was found, October 28, 1916, to the

(Testimony of L. C. Newlands.)

affairs of the Company. Mr. Butchart did nothing about the row between himself and Aman Moore when it became acute. He sent his proxy to Messrs. Griffith, Ainsworth and Cookingham to vote his stock at the stockholders' meeting. When the trouble began and the directors came to a deadlock Mr. Butchart decided to refer the whole matter to the stockholders and issued a call for the proxies of the stockholders to be sent to Messrs. Griffith, Ainsworth and Cookingham and about the same time sent his own proxy to these gentlemen. He practically withdrew from the whole matter and left matters in the hands of these gentlemen. I first learned that Clark M. Moore was to be made sales manager instead of Aman Moore when Mr. Butchart arrived here in April, 1916. Mr. Butchart told me of it. The first that I heard of the claim made by Aman Moore that Mr. Butchart and Mr. Clark Moore or one of them had made an agreement with the Washington and California cement manufacturers or some of them to limit the territory in which the Oregon Portland Cement Company's product should be sold and to fix prices at which it should be sold was on June 9, 1916, when Aman Moore made the complaint in the Circuit Court. I had had other troubles prior to this time, but this matter was never brought before me as a member of the executive committee nor was the matter brought before me as a director. From January 1 to April 1, 1916, my relations with Aman Moore were friendly on the surface. Our relations

(Testimony of L. C. Newlands.)

became strained very shortly after we started running the [325] plant late in May. Aman Moore made some statement to Mr. Butchart and others in regard to my conduct of the construction work and the operation and he also had one or two men at the plant who were making private reports to him which I thought was going beyond his authority. There was never any question between Aman Moore and myself in regard to the sales. There was another matter which made trouble between us. He was trying to organize a paving company to be a subsidiary company of the cement company. He wanted the cement company to contribute some \$25,000 to the capital stock of this paving company and I declined to do so or to have anything to do with it and would do anything which I could to down it. There was another difference between Aman Moore and myself at that time in regard to some matter with Montague & O'Reilly. This matter was never brought before the executive committee. The Montague & O'Reilly matter was in reference to a guaranty that Mr. Moore gave Montague & O'Reilly. Aman Moore signed it for the Company as manager when he was not the manager and had no authority to sign it. Our first car of cement was shipped on June 9, 1916. I had no authority over the sales department until after the indictment was returned. I met Mr. Clark M. Moore when he came here about April 14th. I had never known him before. He did not remain very long then; I cannot say how many days. He re-



(Testimony of L. C. Newlands.)

turned about the time we commenced shipping cement and remained at that time approximately a month. I cannot tell when he returned after that time. When Mr. Butchart told me about Clark Moore becoming sales manager I understood he was to organize our sales department but I understood that when the organization was completed he would hand it over to somebody else—I didn't know whom. Clark Moore [326] ceased to be sales manager some time in 1917, I think in the summer. I met Clark Moore very often while he was sales manager and when he was here I had conversations with him three or four times a week. I was a member of the executive committee during 1916 until it was abolished. The other two members of this committee were Mr. Aman Moore and Mr. Butchart. I knew what the duties of the executive committee were; they were defined by the by-laws. Practically they had the actual management of the plant. I recognize the record book of the Company."

Thereupon Article V of the By-laws of the Oregon Portland Cement Company was introduced in evidence and read to the jury marked Defendants' Exhibit 96.

"I saw all reports of the sales office and everything of that nature and from my general discussions with Mr. Clark Moore I think I was entirely familiar with all that was going on. When he was away I was in close touch with both Mr. Hollister and Mr. J. E. Moore. I knew where ship-

(Testimony of L. C. Newlands.)

ments were going; I had two ways of finding it out, one from our records at the works. All shipments were made under my personal direction. During all this time I heard nothing of Mr. Clark Moore confining the sales of the product of the mill to any particular territory. I did not know that he was doing anything of that kind. There was nothing which led me to suspect that the territory of our Company was confined in any way or that our prices were being fixed by anyone but ourselves. There was no change in the policy of the Company during the season of 1916, no change in the sales policy except minor changes such as putting on more dealers. I know that there was great difficulty in getting cars to ship to different points. The car shortage during 1916 [327] was the second most severe car shortage that we have had in Oregon. Before I came to Portland I had heard that there was a greater shortage of cars at one time than there was in 1916. The shortage of cars caused us to shut down our plant and it also caused us or prevented us from shipping or filling orders promptly at different places, particularly at points off the line of the Southern Pacific. We could get cars more readily for points on the Southern Pacific whether the points were near or far from the plant, than we could get cars for either of the three lines entering Portland. The Northern Pacific would not give cars to the Southern Pacific for loading at our plant and this was true of the O. W. R. & N. We couldn't get the

(Testimony of L. C. Newlands.)

O. W. R. & N. to turn cars over to the Southern Pacific for our loading. This was also true of the S. P. & S. We couldn't get transportation to sell cement in the territory along the Northern Pacific, the S. P. & S. and the O. W. R. & N. During the period commencing from our shipment on June 9th until October 29th, orders for 30 cars were cancelled at Oswego, owing to our inability to get cars to make these shipments. Seven of these were for shipments on the S. P. & S. fourteen upon the O. W. R. & N. and eight on the Southern Pacific and one on the Northern Pacific. The total amount of cement which would have been contained in these shipments was 7500 barrels. During August and September the Southern Pacific supplied us with 30,000 capacity cars, maintenance of way cars, cars that had been used for housing employees, an old type and of low capacity. We used these cars for shipment to Portland and used them in place of large cars. Had we been able to get large cars they would have carried 6235 barrels but these small cars, the only ones which we were able to obtain, only [328] carried 3246 barrels. We had to bring a good deal of cement to Portland by barges, shipped in this way 21,049¾ barrels. This cost 12 to 14 cents more than had we shipped by rail."

Upon cross-examination the witness testified:

"The car shortage began almost at the time when we started making shipments and became steadily worse as the summer progressed. It

(Testimony of L. C. Newlands.)

reached its peak early in September and began to disappear after October, along in November. The car shortage would naturally be more acute in September when the wheat began to move and shipments of pears, fruits and apples, etc., would also add to this. We cancelled orders at the factory for thirty cars and part of these were taken care of at Portland. Cement was brought to Portland by scows where we were able to get cars and couldn't get them from Oswego. I have not tabulated to ascertain whether all of the thirty carloads were eventually shipped but I have all the data here. Among others for whom we had to cancel orders were Montague & O'Reilly, Tum-A-Lum Lumber Company of Redmond, J. K. Irby of Kent, the O. W. R. & N. and the Maryhill Land Company. I don't know whether these parties had to get their cement elsewhere or not. They cancelled orders with us. I haven't the date of the Montague-O'Reilly order; it was Order No. 348, it could be traced from that. I cannot say what the date of this order was but judging by the number I should say it was along in August or early September. The cancelled order of the Tum-A-Lum Company was on August 31st; the order for J. K. Irby was phoned in on August 30th. The first information that I had that it was claimed that our Company had made a combination in restraint of trade was on June 9 or 10th when I saw the first suit that Aman Moore brought against us. I was informed of this charge by the [329]



(Testimony of L. C. Newlands.)

first of September and by this time I knew that the charges had been pressed to such a point that it had been raised in the director's meeting and had been referred to the stockholders' committee on in- been referred to the stockholders' committee to investigate. At about that time the car shortage was at its most acute point. I cannot tell you why between the first of September and the date of the indictment in October our company made five times as many shipments of cement into Washington as it did prior to September. I do know that at certain times this has been the case since. When the O. W. R. & N. Co. start moving grain down to Portland we get the benefit of return cars going back empty. We made no special efforts to counteract the charges made to my knowledge. I know that J. E. Moore on the 29th of August sent the telegram recommending that a sales agency be established in Vancouver. I believe that a letter was introduced in evidence from Mr. Clark Moore about the first of September directing Mr. Hollister to go into Washington and get business. I have said that during a certain period of several months we lost 14.24 cents per barrel on the cement which we made. This covers the period from the beginning of our operations in late May to November 30, 1916, which was the end of our fiscal year. I made a report to the president of that Company about the end of November in regard to the operations up to that time. I know that the secretary made many reports to the president. I was en-

(Testimony of L. C. Newlands.)

tirely familiar at the time with the report made to the stockholders by Mr. Butchart under date of December 20th; I don't recall it now. I think the paper which you show me which was offered in evidence marked Plaintiff's Exhibit 159, is a copy of that report. Our Company showed a loss of 14 cents a barrel during that period. Our report to Mr. Butchart showed a [330] gross profit of \$28,000.00 for the same period. There is a great difference between gross profits and net profits. Gross profits do not allow for fixed charges. Our balance sheet, together with our profit and loss statement which was submitted to the stockholders at their annual meeting to which this letter of Mr. Butchart's refers, shows that we sustained a loss of 14.24 cents a barrel on our operations during that period. If you figure in any business on your gross profits you deceive yourself. I have a summary here of the total cost of our cement during that six months period. I now have it in shape; the total cost to us was \$1.8060. I did testify that it was \$1.75. I made a mistake when I so testified. I had made the footings of the two amounts mentally and my statement that it was \$1.75 was an error; \$1.80 is the correct figure. This paper which you show me marked Plaintiff's Exhibit 160 is a carbon copy of a letter written by me to Clark M. Moore (the same is offered in evidence). It is dated July 15, 1916. The figures which I have in this letter are bare factory cost figures. It means labor and material cost that ac-

(Testimony of L. C. Newlands.)

tually enters into the manufacture of cement and no overhead. Our actual cost during the whole period which I have spoken of, that is to say bare factory cost meaning labor and material, was \$1.1886 per barrel. As a matter of fact our July bare factory costs were 86.9 cents a barrel. The figures which I gave you of \$1.80 is what the cement cost us on the market. This paper which shows this cost is a balance sheet certified by our Auditor and presented to our stockholders, and shows the actual cost of all charges entering into the manufacture and placing of our cement on the market. It covers manufacture and sale. The expression used in my letter to Mr. Moore of July 15, [331] 1916, cost of manufacture means factory cost only; factory cost only without adding any other charges was \$1.1886 per barrel. We had a special rate upon our raw material from Dallas and Roseburg. The rate to-day is \$1.50 from Roseburg; in 1916 it was 35 cents from Dallas and \$1.00 from Roseburg per ton in trainload lots. Mr. Butchart left Victoria early in 1916 and went East. He was in Toronto, in Denver, in Chicago and he may have been in other places that I don't know of. He was in San Francisco in February. I know personally that he gave little attention to the affairs of the Company in 1916. I identify this carbon copy of a letter written by me."

The same is introduced in evidence marked Plaintiff's Exhibit 161 and read to the jury.

(Testimony of L. C. Newlands.)

“It was written to Mr. Boettcher. I say in this letter that Mr. Butchart was actively connected with the management. He was president and had to carry the responsibility but I do say that he gave no orders of any consequence to me at any time during 1916 and I don't know of his giving orders of any consequence to any other person connected with the Company. Of course he was president and what was done was done in his name but there the connection ended. In my letter to Mr. Boettcher I suggested that a letter be written to the stockholders for their instruction. There may be some difference of what a stockholder understands by management and what the attorney for the United States understands by it. Mr. Butchart had men here whom he trusted to run the business during his absence. He had Mr. Clark Moore in the sales department and myself in the manufacturing department and Mr. McDonald as secretary. These are the men whom he had here and whom he trusted to run the business. If any stockholder from the statement which I made in this letter [332] to Mr. Boettcher, got the impression that Mr. Butchart was giving the Company his personal attention then the stockholder would be misled to that extent. On one occasion Mr. Aman Moore claimed to be General Manager when he was not. He was never General Manager of the Oregon Portland Cement Company. Mr. Aman Moore had been General Manager of the Oswego plant at the time that it was run under



(Testimony of L. C. Newlands.)

the name of the Portland Cement Company and this was what was said in my letter to Mr. Boettcher. He had not been General Manager of the Oregon Portland Cement Company. I first knew Mr. Butchart in Victoria sixteen or seventeen years ago; first became associated with him in a business way early in 1907 in Victoria. I continued with him in Victoria until December, 1915, and came to Portland to replace Mr. Butchart's brother here. Mr. Butchart's brother had come out with the intention of taking an active part in the management of the Company, found the situation not congenial so he retired. Mr. Butchart told me that the people who had invested their money in this enterprise looked to him to run the concern and that he had to send a man there whom he could trust. He sent me to Portland. I was elected as a member of the Board of Directors and hold that position still. I have been active in assisting the defense throughout this case, making suggestions to the attorneys for the defense constantly throughout the case in the courtroom."

On redirect examination the witness testified:

"I first came to Portland in December, 1915. I do not believe that Mr. Aman Moore was General Manager of the Oregon Portland Cement Company between the time of its organization and the time when I came here. I think he was General Manager of the Portland Cement Company. I know [333] nothing about that matter per-

(Testimony of George McDonald.)

sonally except what I have heard after I came to Portland."

**Testimony of George McDonald, for Defendants.**

Thereupon Mr. G. McDONALD, called as a witness on behalf of the defendants, testified as follows:

"This telegram introduced in evidence and marked Defendants' Exhibit 97, is a part of the files of the Oregon Portland Cement Company."

The same is read to the jury.

"This is a telegram also a part of the files of the Oregon Portland Cement Company."

The same is introduced in evidence marked Defendants' Exhibit 98 and read to the jury.

"J. E. M. was J. E. Moore. He was assistant sales manager in 1916. I recognize this paper; it was from Mr. J. E. Moore."

The same is offered and introduced in evidence marked Defendants' Exhibit 99 and read to the jury.

"I also identify this paper; it was written by Mr. Joe Moore."

The same was offered in evidence, read to the jury and marked Defendants' Exhibit 100.

"I also identify this paper."

The same is offered in evidence marked Defendants' Exhibit 101 and read to the jury.

"I also identify this paper."

The same is introduced in evidence marked Defendants' Exhibit 102 and read to the jury.

"I also identify this paper written by Mr. Joe Moore."

The same is offered in evidence marked Defendants' Exhibit 103 and read to the jury. [334]

(Testimony of George McDonald.)

“This paper is signed ‘J. E. M.,’ that is Mr. Joe Moore and recognized as a part of the files of the Company.”

The same is introduced in evidence marked Defendants’ Exhibit 104 and read to the jury.

“I also identify this paper as a part of our files.”

The same is introduced in evidence, marked Defendants’ Exhibit 105 and read to the jury.

“I also recognize this paper as one which was received.”

The same is introduced in evidence, marked Defendants’ Exhibit 106 and read to the jury.

“I recognize this file which I have just examined and identify it as part of the files of the Oregon Portland Cement Company relating to the car situation. One or two of the letters in it are originals which we got back from the Railroad Company.”

This file is thereupon offered in evidence marked Defendants’ Exhibit 107 and read to the jury.

Upon cross-examination the witness testified:

“I have no other files containing requests to the Railroad Companies for cars other than the papers offered in evidence but there were more letters sent than have been read. My way of doing business was this. I would write a general letter like one of these, showing a shortage of 79 cars; I would send one copy of that letter to Mr. Henshaw, General Freight Agent, send one copy of that letter to Mr. D. W. Cameron, Assistant General Manager and send a third copy to the local superin-

(Testimony of George McDonald.)

tendent, Mr. F. L. Buckhalter. I am not sure that this file does not contain a request for cars to ship into Washington until September 11, 1916. Requests for cars on the O. W. R. & N. may be for shipments in the state of Washington. Requests for cars to ship into Washington [335] may come under the head of S. P. & S. Cars for Washington would come to Jefferson Street in Portland, there be turned over to the S. P. & S., taken through the city and turned over to the Northern Pacific or the Great Northern for the state of Washington. I know that on September 11, 1916 I wrote to Mr. Henshaw for two cars to go to Washington, one to Maryhill and one to Aberdeen; it may be as I have said that under the head of cars needed for the O. W. R. & N. or S. P. & S. there may have been cars intended for Washington shipment, and it is possible that we had no orders for shipment to the state of Washington at that particular time. I could not say without making an investigation whether we had lost any business in the state of Washington on account of car shortage prior to September 11, 1916."

### **Testimony of Phil Esterday, for Defendants.**

Thereupon PHIL ESTERDAY, called as a witness on behalf of the defendants, testified as follows:

"I am a manufacturer of concrete pipe. The name of my company is Concrete Pipe Company, located in 13 or 14 different towns with 13 or 14



(Testimony of Phil Esterday.)

different plants. In 1916 we had two plants, one at Vancouver and the other at Tacoma, Washington. We used cement in these factories to manufacture concrete pipe; in 1916 we bought Washington, Olympic and Portland Cement. The Oregon Portland Cement Company solicited my business first in the spring of 1916. I was solicited by Mr. Hollister and Mr. Joe Moore. I don't know what month they began manufacturing. I think they began soliciting me as soon as they had any cement to sell. I did not purchase from them at that time. Their cement had not been tested and proven at that time so far as I knew. Cement should pass a required test before it can be used and I usually want to know considerable about a new cement before I will use it. [336] The reason I did not give them any business at first was that their brand was new and I wanted to test it. Afterward I did business with them. I recognize this paper as an invoice for a truck load of cement delivered at Vancouver. It was my first purchase from the Oregon Portland Cement Company."

The invoice identified by the witness was introduced in evidence marked Defendants' Exhibit 108.

"This bill shows exactly what I paid for the cement. I didn't pay as much as the market price. Prior to that time I had been paying \$2.40 to the Washington Portland Cement Company. The price shown by this invoice is \$2.30 less a dealer's commission of ten cents which makes the price \$2.20. There was also a sack allowance of ten cents a

(Testimony of Phil Esterday.)

sack, with four sacks to the barrel, making net price of cement \$1.80. I had been paying \$1.90."

Upon cross-examination the witness testified:

"I had been paying \$2.40 for cement,—no, since you call it to my attention I think I had been paying \$2.30. The Oregon Portland Cement Company quoted this price of \$2.20 in Vancouver about the time that I purchased the cement, September 11, 1916. Prior to that time they had not offered me any advantage over Washington prices. They probably solicited my business at my office in the city of Portland; I had an office in the Board of Trade Building. I testified that I think the reason I didn't buy the cement prior to this date September 11, was that the Oregon Portland Company's cement had not been tested. I do not remember giving that reason to these parties. It is quite likely that I did have some discussion along that line. I don't know whether I did or not. I do not recall. About September 11th they came to me and offered me a 10 cent better price than I had [337] been paying the Washington Company, said they wanted my business; they were keen to get my business all the time. I am sure they offered this special inducement to get my business. I do not think any explanation was made; those things are not usually explained. I don't remember any explanation being made."

**Testimony of George T. Cameron, for Defendants.**

Thereupon GEORGE T. CAMERON was called as a witness on behalf of the defendants and testified as follows:

“I reside in San Francisco, California, am president of the Santa Cruz Portland Cement Company. The output of the two factories in California is about two million barrels a year. They are the largest producers of cement on the Pacific Coast. I have seen Aman Moore once but don't know him. I saw him last year when this case was tried before. I know R. P. Butchart; have know him I think about ten years. I think I met him first about 1914, met him in San Francisco. I know Clark M. Moore; I think I have known him about four years; have seen him three times. I met him at a meeting of the Portland Cement Association on the Pacific Coast in 1916. I met him a little later than that in San Francisco and again in Washington in 1918 as a member of the War Service Committee. He and I were members of the War Service Committee. My relations with Mr. Butchart during the time I have known him were not intimate. I did not meet Mr. Butchart at all in 1916. I think after I met him in 1914 the next time I met him was here in the courtroom when this case was on trial before. I think I attended a meeting of cement manufacturers in San Francisco in 1916 at the St. Francis Hotel. Mr. Butchart was not present. Mr. Clark M.

(Testimony of George T. Cameron.)

Moore was present. Offices in the Portland Cement Association were held by paid men, not by representatives of the cement companies. I [338] never was a member of the executive committee of the Portland Cement Association. The meeting in 1916 to which I refer was a meeting of the National Association on the Pacific Coast; it was a meeting of the Pacific Coast manufacturers but they were members of the National Association. There had been a new general manager appointed and he came out to get acquainted with the Pacific Coast men and called this meeting at the St. Francis. His name was Beck; he is now dead. This was the meeting at which I met Mr. Clark M. Moore. Mr. Butchart was not present at the meeting. I have had some talk with Mr. Butchart in regard to the cement situation in Oregon, Washington and California. This was in 1914 when I first saw him. To the best of my recollection Mr. Butchart was in San Francisco at the Palace Hotel. I went over to see him and found him in the Bar and talked to him about the Oregon Portland Cement Company. It was partly built and required financing and I had understood that he was going to put up the money to continue it. I did my best to show him that I didn't think he could make any money out of it; it was a small plant, had to go a long way for its rock, would require a good deal of money to finish it and I thought that the management that then had control of it was not qualified to make any money for him.



(Testimony of George T. Cameron.)

I was naturally interested that no more cement mills should be built on the Coast due to the fact that so many had been built that our territory was being restricted every year or two by competition and I discussed this matter with him in the hope that he wouldn't go ahead with the plant. He listened to me very attentively and courteously but didn't tell me what he was going to do. Nothing was said in regard to the territory which this cement company was going to have. That is the only talk that I [339] ever had with Mr. Butchart at any time. I never had any conversation with Mr. Butchart either in 1915 or 1916 or at any other time in regard to the territory which the Oregon Portland Cement Company would use as the place for marketing its cement or the price that it should charge for its cement. In this talk in 1914 it may be that some mention was made of the capacity of the Oregon Portland Cement Company's mill. I figured it would be about 250,000 barrels a year and may have discussed this capacity in my conversation with him about financing it. I wouldn't remember it if I did. I never had any talk with Mr. Butchart at any time or any place in regard to Mr. Clark M. Moore. I never had any talk with him at any time or any place in regard to who should be sales manager of the Oregon Portland Cement Company's plant. I never had any talk in regard to who should be the sales manager of the Oregon Portland Cement Company's plant, with any cement manufacturer.

(Testimony of George T. Cameron.)

In regard to Mr. Aman Moore's testimony that cement manufacturers on this Coast, particularly Mr. Rogers and Mr. Coats, Mr. Erlin and Mr. Henderson or both and myself and Mr. Muhs or one of us, said that Aman Moore was *persona non grata* and that they didn't want to have him come into this market, I don't know what might have been said to others. It was immaterial to us what the Oregon Portland Cement Company did. Its output was small; it couldn't raise or lower the price and my only object was to keep it from going into business. If it went into business I couldn't help it. I couldn't stop it from selling or do anything to interfere with its business; it couldn't do anything to interfere with ours so far as prices were concerned. If anything of this character was said to any of the other manufacturers of cement it was not made known to me at any time. The claim that the [340] price of cement in Oregon was fixed by an agreement between California cement manufacturers, Western Washington cement manufacturers, possibly the eastern Oregon manufacturers and the Oregon Portland Cement Company is not true since they couldn't have fixed prices without our consent and we never gave our consent and never made any agreement with them. As a matter of fact our companies since 1909 to date, have published prices for our cement. We had two factories and these prices lists have been governing prices for our cement. Other cement companies have had these lists, our salesmen have had

(Testimony of George T. Cameron.)

them; if they chose to follow these prices they could and if they didn't they didn't have to. We sold our cement on our prices and made them ourselves. We made these prices in our own office without consultation or any agreement or understanding with many other cement manufacturers. We did business in Washington up to 1912 or 1913. We have done practically no business in Washington since that time. We may have shipped a little. The mills up in Washington were able to take care of the business in Washington and it didn't attract us, and to have continued business in that field would have provoked a cement fight so we withdrew from Washington and held the Oregon territory. We had no agreement or understanding with any other cement manufacturer in regard to retiring from Washington or holding the Oregon territory. We had no agreement with any company. We were forced out of that market. When I met Clark Moore in California in 1916 I had no talk with him regarding the cement situation on this Coast. Discussions at that meeting were all on Association matters. The meeting was called for the purpose of promoting the use of cement. The Portland Cement Association is a body composed of the majority of the cement manufacturers in the United States [341] engaged wholly in promoting the uses of cement or in improving the quality of cement. It has nothing to do with the question of selling or sales policy. There was no conversation of any kind at that

(Testimony of George T. Cameron.)

meeting in regard to the territory in which the cement companies should sell their product or the prices at which it should be sold. I never had any agreement or understanding of any kind with the Oregon Portland Cement Company or with any of its officers or with Mr. Butchart or Mr. Clark M. Moore either in regard to where the product of the Oregon Portland Cement Company should be sold or where the product of our own factory should be sold or in regard to the prices at which the Oregon Portland Cement Company's product should be sold or in regard to the prices at which our own product should be sold. I never had any conversation about these matters. I can't tell you the specific prices at specific dates at which the Oregon Portland Cement Company sold its product. From the time it started business until October 27, 1916, I do know that the Oregon Portland Cement Company has consistently under-sold our product. Their prices have been cheaper than ours for all these years. The policy of our company as far as we can is to sell to consumers directly; in the country we sell through dealers, in the large cities we sell directly ourselves without paying dealers' commission. All the other cement companies of the Coast, including the Oregon have for a number of years, and I think do to-day, although I am not sure, sell their product through dealers in the city of Portland. They have been giving them 15 cents a barrel dealer's discount which obviously nets them 15 cents a barrel less



(Testimony of George T. Cameron.)

than we receive for ours. We do not do this at all. We had an agent, Crowe & Company, up to about 1912. We then opened our own office and Crowe & [342] Company a little later found themselves unable to handle our account financially and retired from business. We were sorry to lose them. They had been efficient but we were compelled to put all the business in our own office. We have never had an agent since then, I should say have never had a dealer since then. After we commenced selling from our own office our representative is our employee. I think when I was here a year ago I saw the circular letter or price list issued by the Pacific Portland Cement Company some time in 1916 (witness refers to the letter offered in evidence). I do not know what circulars our salesmen put out. We issue circulars or price lists nearly every month. Our cement that came into Oregon was destined for Portland; Portland was the basing price of cement and all cement in the territory adjacent to Portland moved from Portland. Therefore the price at any delivered point was the Portland base price plus the local. Cement moving to Portland by water passed Astoria and there was an insistent demand from Astoria that the price be made the same at Astoria as at Portland. I believe that for a short time we established the price at Astoria the same as Portland, on the theory that this was the proper situation, but the facts of the case worked adversely to that, because if a ship came into Astoria

(Testimony of George T. Cameron.)

and the bar was rough or it was late it frequently brought its cargo to Portland. We had established and named the price at Astoria and we were compelled to ship that cement to Astoria by rail and lose the difference in freight. Sometimes we couldn't get a vessel to stop at Astoria and our customers would be short of cement so then again the cement moved from Portland to Astoria, so the net result of it was that while the theory that the Astoria price should be the same as the Portland price, was correct, in fact it worked to [343] our disadvantage and we therefore established a price at Astoria equal to the Portland price plus the local, and if there was any opportunity to deliver at Astoria by water we made the difference instead of giving it away. While we were in business in Portland we have always kept a stock of cement in Portland, but kept none in Astoria."

Upon cross-examination the witness testified:

"I said that we found it necessary to make the Astoria price \$2.30 plus freight to Astoria; that was the price at one time. I don't remember what the prices were in June, 1916. Our price sheets and our records would show this. If the Portland price in June, 1916 was \$2.30 the Astoria price was \$2.30 plus the freight from Portland to Astoria. This price applied whether we brought our cement to Portland and shipped by rail to Astoria or whether we took it off the boat at Astoria. The water freight rate to Astoria was always higher

(Testimony of George T. Cameron.)

than the freight rate to Portland, by about 25 or 50 cents a ton. This was because the steamers lost time stopping to discharge at Astoria; when in Portland they discharged all their cargo at one time. We used all the different lines coming back from San Francisco. I cannot name any of the boats, I wouldn't remember that, but I know they charged more, sometimes 25 cents, sometimes 50 cents a ton more; sometimes they wouldn't go into Astoria at all because if they made Astoria at seven o'clock at night they would have to lay over all night and then go up the river. In some cases Astoria has the same terminal water freight rate that Portland has from San Francisco, but generally the boats charged higher because of losing time in stopping to discharge at Astoria. The boats actually charged us more freight to Astoria. We made the dealers at Astoria take care of the unloading charge. [344] We sent out price circulars every month. Our office mails them to our salesmen and dealers and other cement companies. We send them to competitors. They were printed and open; there was no secret about them. Anybody can have them just as a railroad tariff. Any cement company can find what our price list is. Mr. Fred R. Muhs was the manager in the office. We had an agency with Crowe & Company until 1912, possibly until 1914. I don't remember the date. I do not know anything about a meeting at the Palace Hotel in San Francisco attended by Mr. Muhs which resulted in his telling Mr. Far-

(Testimony of George T. Cameron.)

rington of Crowe & Company in Portland that they were not going to continue to sell cement in Washington. It is quite possible that this occurred but I don't think such a thing ever happened for Mr. Muhs couldn't have said that without my concurrence and I never agreed to any such thing. It wasn't necessary to make any agreement with the Washington companies. I don't recall being present at any conference of manufacturers of cement in San Francisco other than meetings of the Portland Cement Association. I don't think I was present at any meeting in June, 1914 or July, 1914 with Mr. Coats of the Washington, Mr. Eden of the Superior, Mr. Cameron of the Olympic, Mr. Muhs of our company, Mr. Erlin of the Pacific and Mr. George of the Cowell. There never was any agreement that the California companies should withdraw from the state of Washington. There might have been such an agreement on the part of other cement companies but there certainly was none on my part. We were forced out of Washington but held our ground in Oregon. I never heard of any proposition about the line between the California and Washington companies being fixed at Salem until last year in this courtroom. There was no such proposition as that at [345] all. I heard some of Mr. Coats' testimony but I didn't hear him testify about that. I was told about his so testifying afterwards. I was one of the defendants in this case. Generally speaking the Oregon Portland Cement Company undersold us at every



(Testimony of George T. Cameron.)

point. There may have been cases where they did not, but I can say that almost universally and generally they undersold us. We had no dealers in Portland ourselves. We had dealers in the country always and allowed them a commission of ten cents a barrel. This was allowed to all country dealers."

**Testimony of Melvin J. Ballard, for Defendants.**

Thereupon MELVIN J. BALLARD, called as a witness on behalf of the defendants, testified as follows:

"At present I reside in Salt Lake City. In 1916 I resided in Portland, Oregon. I was connected with the cement plant at Oswego from the beginning. I have known Aman Moore since 1909; my relations with him were agreeable. I took a part in raising money for this institution at the instance of Aman Moore. When he sent me out to solicit subscriptions he gave me the merits of the proposition, that the company had secured the most desirable cement deposits within a radius of 150 miles of Portland, that the city of Portland was at that time using approximately between three and four hundred thousand barrels of cement which would be our natural output, and that our plant running at capacity would not supply even Portland, and gave that as evidence of it being a good proposition. I held office in the Oregon Portland Cement Company from the summer or fall of 1915 until the first of this year. I was a director and

(Testimony of Melvin J. Ballard.)

vice-president. I had some conversation with Aman Moore in regard to his relations with other officers of the corporation. These conversations began at the time of the reorganization of the [346] company, I think in the fall of 1915 when we were discussing the proposed new officers of the company. I had some conversations with him in regard to the same matter afterwards. About the close of 1915 he solicited my support as one of the directors to support him as general manager of the company. During these conversations Aman Moore made some representations to me in regard to how Mr. Butchart intended to run the concern. He did not show me, as I recall, any correspondence between himself and Mr. Butchart. I never saw the letters, Government's Exhibits 83 to 97, inclusive, until the former trial of this case. I heard a part of them read; I didn't hear all of them read. I don't recall whether these letters contained anything with reference to Mr. Butchart's being president, but Aman Moore did tell me that his arrangement with Mr. Butchart was that Mr. Butchart was to be president of the company. Aman Moore never told me that Mr. Butchart was making any arrangement or intended to make any arrangement or had made any arrangement with the California cement makers and the Washington cement makers, to divide the territory in which the product of their several mills could be sold, or to fix prices upon the products of their several mills. He never made any reference to any ar-

(Testimony of Melvin J. Ballard.)

rangement of this character. While acting as director I was in the office usually about once a week. After receiving a letter from Mr. Butchart about June 16, 1916, asking me to look after the interests of the company and represent him, I spent considerable time in the company's office. The first time that I heard that Aman Moore charged that Mr. Butchart had made an agreement, or had entered into a combination with other cement manufacturers in California and in Washington in regard to the territory in which the product of the Oregon Portland Cement [347] Company should be sold and the price at which it should be sold, was at a directors' meeting, I think in the month of June, 1916. Mr. Aman Moore never made any complaint to me in that regard prior to the time when this meeting was held. I was present at the meeting when Mr. Clark M. Moore was made sales manager; I had no conversation at all with Aman Moore in reference to Mr. Clark Moore being made sales manager; that came as a surprise to me at that meeting. I met Clark Moore about that time. Not until the directors' meeting at which Aman Moore made the charge and gave each director a copy of a certain letter, did I hear that Aman Moore claimed that he went to several directors, he thinks all of them, and told them that he had met Mr. Butchart, that Mr. Butchart told him that he had met the cement manufacturers in California and the Washington manufacturers, and had agreed with them that the territory in which the

(Testimony of Melvin J. Ballard.)

Oregon Portland Cement Company should sell its product should be limited and the price at which its product should be sold should be limited. I had no conversation at all with Aman Moore in regard to Mr. Clark M. Moore being appointed sales manager until he was so appointed. Aman Moore told me absolutely nothing; I was surprised to hear Aman Moore nominate Clark Moore for sales manager. Aman Moore did not tell me that Mr. Butchart told him that he was appointing Clark Moore as sales manager instead of Aman Moore under an agreement with some or all of the California cement manufacturers or the Washington cement manufacturers because these manufacturers said that Aman Moore was *persona non grata* with them and would not keep any agreements which they had made. He made these charges later, but not prior to the time when he brought his first suit. When the charges were made I asked Mr. Aman Moore for the evidence of his statement, [348] asked for it repeatedly. He declined to give me any evidence. I remember that Mr. Minor, another of the directors, made the same demand. I made one investigation to ascertain whether or not these charges of Aman Moore were true or not true, interviewed all of our employees, looked over the sales record for several months, interviewed a number of companies selling cement here and elsewhere and joined with the directors in appointing a committee of stockholders."



(Testimony of Melvin J. Ballard.)

Thereupon the following proceedings were had:

“Q. What evidence, if any, did you find?

“A. Absolutely none.

“COURT.—What is that?

“Mr. MINOR.—What evidence if any, did you find?

“COURT.—I say that is not competent. You can't try the case on what he found. I think the objection is well taken.

“Mr. MINOR.—The point I make is this: After he read the allegations he went and interviewed these several parties and has a right to tell what evidence he found, not anything else.

“COURT.—I don't think so.

“Mr. MINOR.—Very well. We offer to show by this witness that he found no evidence on which he could undertake to base a charge of violation of the law, and will save an exception to your Honor's ruling.”

The exception was then allowed.

The following proceedings were thereafter had. The defendants' attorneys asked the witness Ballard the following questions:

“Q. What did you do, Mr. Ballard, in order to ascertain the prices at which the Oregon Portland Cement [349] Company's products were being sold?

“Mr. HUMPHREYS.—Object as immaterial.

“Objection sustained; exception saved and allowed.

(Testimony of Melvin J. Ballard.)

“Mr. MINOR.—I think we are entitled to show these parties went to the books and found at what prices the product was being sold.

“COURT.—I think the books and records are what we ought to have in this case; not what somebody else found out.”

“I talked with Clark Moore in regard to the policy which he was going to pursue in selling the product of the Oregon Portland Cement Company’s mills. I talked with him, I think, in April, 1916. He told me they would take the best part of the territory first, which was Portland, and extend the work as fast as we had cement, after taking care of the Portland market. There was no suggestion as to what our territory should be except that we would sell as far as we could.”

Thereupon the defendants by their attorneys propounded to the witness the following question: “And what, if anything, did he say to you with regard to prices at which the product of the mill was to be sold?” To this question the attorney for the United States objected upon the ground that the declarations were self-serving declarations, and thereupon the Court sustained the objection and refused to allow the question to be asked, and to this ruling the defendants, by their attorneys, excepted and offered to show that Clark M. Moore said nothing in regard to the prices at which the product of the mill was to be sold, and the exception was allowed.

(Testimony of Melvin J. Ballard.)

“The meeting at which Mr. Aman Moore presented some papers in which he made some charges, as I recall, was a special meeting for a special purpose, and the business suggested [350] by these papers could not properly be considered at that meeting and we asked Mr. Aman Moore to suggest a time for a meeting to consider his charges. Aman Moore offered no suggestion, simply saying ‘It is up to the Board.’ At that time Aman Moore was a vice-president of the company, and Mr. R. P. Butchart was not here.”

**Testimony of H. S. McCracken, for Defendants.**

Thereupon H. S. McCracken, called as a witness on behalf of the defendants, testified as follows:

“I reside in Portland, am a building material dealer and deal in cement. During the year 1916 and prior to October 27th of that year I had business with the Oregon Portland Cement Company; commenced early in June, 1916, when they started operations, was solicited for business by that company just before they started operations and purchased cement from that company. The first carload purchased from that company was shipped early in June; I cannot say whether it was their first shipment. Before buying cement from them I bought from the Pacific Portland Cement Company, Henry Cowell Lime & Cement Company, and the Santa Cruz Portland Cement Company, all California companies. I cannot remember what

(Testimony of H. S. McCracken.)

price I was paying these California companies. This bunch of papers run from May 1, 1916, to May 26th of the same year. It contains bills of one company only; the price was \$2.30 per barrel upon which they allowed ten cents for each sack when returned. No commission was allowed but a discount of 1% for cash in ten days. These papers marked Defendants' Exhibit 109 are invoices drawn against us by the Oregon Portland Cement Company. They show correctly the prices we were paying this company. Clark Moore solicited our business, no one else at that time." [351]

Thereupon the papers identified by the witness, marked Defendants' Exhibit 109, were offered in evidence and read to the jury.

"The pencil figures \$46.20 and \$485.10 on these papers, Defendants' Exhibit 109, indicate a discount of 20 cents a barrel on 231 barrels; I should have said it was a commission taken off. There is also a commission of 20 cents a barrel on 173 barrels, one notation in pencil shows a commission of 20 cents a barrel on 231 barrels. Another invoice shows a commission of 20 cents a barrel on 289 barrels. The Pacific Portland Cement Company's price was \$2.30 net per barrel, allowance of 1% discount for cash in ten days. Oregon Portland Cement Company's price was \$2.30 per barrel with a commission of 20 cents per barrel and a discount of 1% off the gross amount of the bills before the commission was taken off; I would call this a cut of 20 cents a barrel in price. I identify



(Testimony of H. S. McCracken.)

these papers. They are invoices against our company of two different cement companies, taken from our files and have my personal O. K. on most of them."

The papers identified by the witness were introduced in evidence marked Defendants' Exhibit 110 and read to the jury.

"One of these papers bears a pencil memorandum. This was a discount of 5 cents per barrel paid on the day following the one that was issued; no dealer's commission was allowed on this last invoice. On one of these invoices there was evidently an error in the bill. I called attention to it and deducted 20 cents a barrel discount instead of 10 cents noted on the same. Another of these papers show pencil notations. This was an error in the bill in figuring and we corrected it. Upon another one of these is a pencil [352] memorandum. They evidently neglected to take off the commission on this invoice and I took it off in pencil and paid the net 10 cents a barrel on  $6\frac{3}{4}$  barrels. Upon another is a pencil memorandum, six barrels, deducting from \$13.80; this is a like matter. Another shows a pencil reduction of \$1.80 for 18 barrels. Another of these bills is a bill of the Santa Cruz Portland Cement Company; that notation on it shows a cash discount of 5 cents a barrel deducted. Invoices in evidence show deduction for commission, some at 10 cents a barrel, some at 15 cents a barrel, and some at 20 cents

(Testimony of H. S. McCracken.)

a barrel. The prices varied as shown by the invoices."

Upon cross-examination the witness testified:

"I have seen Defendants' Exhibit 110 within a week. I don't know who put it in the form in which it is now. Invoices would originally be in the order of the dates in our office. I don't know whether the form has been changed since they left our hands. As far as I know they are in the same condition in which they were when they left our office. I don't know why there are no invoices shown from the Pacific or the Henry Cowell cement companies, unless we were not buying from them at those particular dates. I don't know whether at that time the Pacific Company was allowing the same dealer's commission as the Oregon. I cannot remember anything but what the invoices show. I don't know whether we got the 20 cents commission from the Oregon when they first started or not or whether they changed from 20 cents to 15 cents or from 15 cents to 20 cents. I remember nothing except what the invoices show. I cannot say whether the Pacific was allowing 10 cents a barrel commission in Portland at the same time that the Oregon Company was allowing me 20 cents [353] commission, and I cannot remember that the commission which was allowed by the Pacific was changed to 15 cents at the same time that the Oregon was changed to 15 cents. I expect our company is the one mentioned as McCracken in Plaintiff's Exhibit 122, dated August 16, 1916. There was no other Mc-

(Testimony of H. S. McCracken.)

Cracken dealing in cement in the city of Portland. Judging from that letter of August 16, 1916, if we purchased any cement at that time I suppose we would get the commission as stated in that letter. Invoices dated September 23d, 1916, August 21, 1916, October 25, 1916, and October 16, 1916, were all after the date of this letter of August 16, 1916. From the face of these few invoices it doesn't appear that we were buying Santa Cruz cement subsequent to August 16, 1916. If I could get 15 cents a barrel allowance from the Pacific and couldn't 15 cents a barrel allowance from the Santa Cruz I still bought Santa Cruz sometimes when people specified Santa Cruz in their order."

Thereupon the attorney for the United States propounded to the witness the following question:

"Q. At what price did you sell cement at that time?

"Mr. MINOR.—I think that is immaterial, at what price the dealer sold it.

"Mr. HUMPHREYS.—The indictment charges, among other things, that the consumers of cement, by reason of this combination, had to pay a higher price for the cement than they would have had to pay had there not been this combination in restraint of trade.

"COURT.—I think the objection is well taken under that form of indictment.

Mr. MINOR.—Save an exception. My point is, it doesn't make any difference what these people charge the [354] consumer, the question before

(Testimony of H. S. McCracken.)

the Court is, what these people received for our cement.

“COURT.—The question is whether you entered into a combination to fix prices and divide the territory. Answer the question.”

The exception was then allowed and the witness testified:

“As I remember we sold at \$2.30 because we could get no more for our cement than the companies could get. The California companies that were selling cement in Portland in 1916 each had its own selling agency in the city of Portland. These selling agencies as I understand, were a part of the organization of the home establishments. The Santa Cruz agency in Portland was selling cement to the public at \$2.30 and we were selling cement at the same price. In May the Pacific was selling at \$2.30 and so was the Cowell Lime & Cement Company. Our remittance sheets show that in May, 1916, we got nothing from the Pacific people but a 1% discount. We sold on this margin of 1% discount in some cases to satisfy our customers when they would specify a certain brand of cement. I couldn't remember actual conditions at that time. I have nothing to go by but the figures in our invoices. 1% is a very small margin, a dangerous margin. A man cannot handle cement upon that margin without losing money. We don't make a custom of handling on such a margin. We usually make a profit on cement but when we had to buy some particular brand to fill an order such



(Testimony of H. S. McCracken.)

condition might occur. I cannot remember just what the Pacific Cement Company did afterwards; there was some change, but I don't remember the date of it. Clark Moore solicited our business for the Oregon Portland Cement [355] Company. Exhibit 27 bears my signature. I didn't notice the date of it when I looked at it before. It is an order bearing date January 1, 1916, order No. 1 upon the Portland Oregon Cement Company. Stating from memory I think Clark Moore was the first man we met in connection with that business. If he was not connected with the company at the date of that letter my memory is at fault. I can't remember advertising Oregon Portland cement. I identify this letter, a letter from Clark M. Moore (offered in evidence, marked Plaintiff's Exhibit 162). We didn't advertise generally. It is possible we ran an advertisement in one of the building papers something like that. We do very little advertising of any kind."

Upon redirect examination the witness testified:

"Oregon Portland Cement Company did not fix a price at which we should sell the cement. They made no requirement that we should sell it at any certain figure. We purchased cement outright from it and we sold it. We had no restrictions places upon us as to points at which we should ship Oregon Portland cement; no restrictions were made to our shipping Oregon Portland cement into the state of Washington or any farther north than the Columbia River. No restrictions were

(Testimony of W. F. King.)

placed upon our cement at all. The cement belonged to us and we could sell wherever we wished. We had no restrictions as to territory."

### **Testimony of W. F. King for Defendants.**

Thereupon W. F. KING, called as a witness on behalf of the defendants, testified as follows:

"I live in Prineville, am engaged in the hardware and implement business and used to handle cement. In 1916 I lived in Prineville, was handling building material, including cement. I bought from the Oregon Portland Cement Company and from the Santa Cruz Portland Cement Company. I first [356] bought from the Oregon Portland Cement Company in July, 1916. Prior to that time I was buying from the Santa Cruz Portland Cement Company. I was paying the Santa Cruz Portland Cement Company \$3.02 f. o. b. Redmond, which was our nearest railroad point at that time. Redmond is south and west of Umatilla and west of Prineville. They gave me a commission of 10 cents a barrel, an allowance of 10 cents a sack for all good sacks returned. I don't think I took advantage of any cash discounts. I paid the Oregon Portland Cement Company \$2.92 f. o. b. Redmond, got a 10 cent dealer's commission and 10 cent sack allowance. I recognize these papers as bills from the Oregon Portland Cement Company to my firm and letters and quotations from the Santa Cruz Portland Cement Company."

(Testimony of W. F. King.)

The papers identified by the witness were offered in evidence marked Defendants' Exhibit 111 and read to the jury.

"The quotations of the Santa Cruz Portland Cement Company did not change to my knowledge from the date of the first quotation, May 3d, through to the last purchase I made of them in June, 1916. Oregon Portland Cement Company did not restrict or fix terms or prices at which I should sell cement nor the territory in which I should sell the same, but we have a custom in our country of not interfering with agents in other towns or dealers in other towns as far as possible. We never try to sell any at our railroad point Redmond, but confine our business to our own town, Prineville. This was according to our custom and not at the request of the Oregon Portland Cement Company."

**Testimony of C. W. Klippel, for Defendants.**

Thereupon C. W. KLIPPEL, called as a witness on behalf of the defendants, testified as follows:  
[357]

My business is building material and feed. I was in this business in 1916, associated with Nottingham & Company as secretary and office manager. I have been with that company for about twenty years in the same capacity. I was familiar with cement quotations and cement prices paid by Nottingham & Company in 1916. In June, 1916, we bought from Oregon Portland, Washington Portland, and I think a little from Pacific Port-

(Testimony of C. W. Klippel.)

land. We paid Oregon Portland \$2.30 a barrel gross, were allowed 10 cents a sack or 40 cents a barrel for sacks, and 15 and 5 or 20 cents off a barrel as commission, and a cash discount of 1% if paid in ten days. In June, we were buying from the Washington Portland at \$2.30 gross per barrel or \$1.90 net with 1% cash discount. I had some invoices from the Washington Portland Cement Company at the former trial of this case, but I couldn't find them. I have a ledger transcript that covers these invoices. Washington Portland Cement Company manufactured in the state of Washington. I bought 95 barrels from them on June 12, 1916, and paid \$2.30 a barrel gross. I had a commission of 1% cash if paid in ten days. No allowance or commissions were made me as a dealer on that cement. An allowance of ten cents a sack was allowed for sacks. I haven't the invoice from that company dated June 15, 1916; I have a copy of it. It reads 42 barrels, \$96.60 gross or \$2.30 a barrel. I had no commission or allowance upon this except 1% cash if paid in ten days and ten cents a sack of 40 cents a barrel for sacks returned. I also purchased from the Washington on June 28th and June 23d, paid \$2.30 gross per barrel. I purchased a carload on the 28th and one on the 29th. The last car I purchased was on July 7th, paid for this \$2.30. [358] I also purchased from Oregon Portland Cement Company. We continued to purchase from them for possibly two years. Its price was a little



(Testimony of C. W. Klippel.)

better up to August 18th. About that time we had a proposition from other companies to meet their price. This proposition was from the Pacific Portland, I believe. It was not the same either; there was no 1% off for cash. Possibly the Henry Cowell Lime & Cement Company made the same offer. I am not sure about that, we bought from them during the summer. Oregon Portland Cement Company did not undertake to fix a price at which we should resell their cement. I don't know whether they knew where we were shipping and delivering their cement; I think we shipped most of the Oregon's cement direct. They did not restrict or undertake to restrict the territory in which we should resell. No instructions were ever given or requests made that we should not sell north of the Columbia river or east of a line running north and south through the Deschutes or of a line running north and south through Umatilla or south of a line running east and west through Drain or Roseburg. There were no restrictions whatever."

Upon cross-examination the witness testified:

"We bought from Washington in June and July. I suppose we needed more of that cement to fill certain orders. Possibly we had work to fill in which required Washington cement. I am in the same company with Mr. C. W. Nothingham. We understood that the Washington Portland Cement Company had withdrawn and that all the Washington companies had withdrawn from Oregon. I

(Testimony of C. W. Klippel.)

don't remember what particular contracts we were filling with Washington in June and July. Before the first of January, 1916, we had been buying most of our cement from the Washington Portland Cement Company for a year and [359] a half and we continued to buy from them until the Oregon started. They gave us a commission up to the summer of 1915 when they cut off the commission. We had to have cement; we had worked up quite a Washington trade so we continued handling Washington, making our cartage out of it. After about the 18th of August, 1916, the California companies and the Oregon Company allowed the same commission except that we got a small discount from the Oregon, I think 1%. I do not know whether other cement people knew what we were paying. We were not aware that they knew that we got a little better rate from Oregon."

### **Testimony of H. H. Corey, for Defendants.**

Thereupon H. H. COREY was called as a witness for the defendants and testified as follows:

"I reside in Salem; am a member of the Public Service Commission, have been for four and one-half years; was a member in the summer of 1916."

Thereupon the defendants offered to show by this witness the condition in Portland and surrounding country of the car service, and thereupon the attorney for the United States stated that his client did not question Mr. Newlands' statement in regard to the car shortage, that it began about the time the

(Testimony of W. V. Wellman.)

Oregon Portland Cement Company began marketing its product and became worse in September.

**Testimony of W. V. Wellman, for Defendants.**

Thereupon W. V. WELLMAN, called as a witness on behalf of the defendants, testified as follows:

“I reside at Helena, Montana, represent F. B. Connolly Company, at Billings, Montana. I am not now connected with the Oregon Portland Cement Company in any way. I was connected with this company from about June 1, 1916, until March 14, 1917, employed as a salesman by Mr. Clark M. Moore. [360] I began soliciting about June 1, 1916, under Mr. Clark Moore’s direction. The first trip I made, I was directed to go to Eastern Oregon and solicit business for the company. I went. Mr. Clark Moore was in charge of the sales department at that time. Mr. Joe Moore had charge of that department a short time after I entered the employ of the company. No instructions were ever given me at any time by the sales office of the Oregon Portland Cement Company restricting the place where I should sell their cement. I sold in Washington and Oregon. I sold my first order at Bend, sold in Condon, sold for shipment to Enterprise and The Dalles, Hood River, and various places in the Willamette Valley south and down the Coos Bay country to Marshfield and down the Columbia River as far as Astoria and Seaside. I remember the letter offered in evidence referring to my report

(Testimony of W. V. Wellman.)

regarding Golden Gate cement in Marshfield being shipped on consignment to apply on one of the Oregon Portland Cement jobs. We had two contracts in that country. Upon my first trip there I found the work was being done with Golden Gate Cement and found that this cement had been shipped into Marshfield on a boat on consignment, freight prepaid. Golden Gate is manufactured by the Pacific Portland Cement Company, a California company. I found this consigned cement in Marshfield I think in August, either in July or August, 1916. I was unable to see any invoices to show the price at which it was sold, but information which I gathered from different sources led me to believe that the ultimate user might have obtained some concession. I sold cement in Bend; it is east of the Deschutes. I met Mr. Butchart last Saturday for the first time. I never had any correspondence with him. I [361] made sales in Washington."

Upon cross-examination the witness testified:

"When I learned of this trouble down in Marshfield about Golden Gate I made a report to our company. I didn't furnish any cement after that. I created a lot of business down there, but we eventually didn't get the order. Pacific Portland cement was furnished. My report did not do us any good. I sold cement in June, 1916, to the Maryhill Land Company. I made the sale to Mr. Potter who was Mr. Sam Hill's representative here in Portland. Maryhill is in Washington."



**Testimony of G. C. McDonald, for Defendants.**

Thereupon G. C. McDONALD, called as a witness on behalf of the defendants, testified as follows:

“I reside in Portland, Oregon; am local manager of the Henry Cowell Lime & Cement Company. I have held this position in Portland since 1914. Prior to that I was in Tacoma, Washington, for the same company. Since I have been in Portland I have been in close touch with the cement market in Portland. I get my information by inquiry of different dealers, consumers, and friends. During that period some of the cement manufacturers have issued price lists from time to time; we have not. We issued one price list in 1914 and the next one I think in 1919. I used to get hold of price lists issued by other cement manufacturers by asking for them from the different dealers. These price lists undertook to give the delivered price at different points. During that period on small business I think these price lists were maintained, I know we maintained ours, but on big business there never was a price. Practically cement was always sold below these price lists. This was the case with our [362] company and as far as I could gather the facts this was the case with other companies. In Tacoma I represented Henry Cowell Lime & Cement Company. I then came to Portland for the same company. While in Portland I sold cement in Washington also; did whatever business we could pick up that would figure a little profit or at least break even. To fill Washington orders most of

(Testimony of G. C. McDonald.)

the cement went from San Francisco direct, but the small orders were sent from Portland. We kept a stock of cement on hand in Portland at all times. I remember the correspondence between the Aberdeen Manufacturing Company and myself which has been offered in evidence. It was run by Mr. Wylie and for quite a while we did business with him and his payments were fairly good; then they got into us pretty deep so I figured how we should best get out. I wrote him one or two letters, told him I was going to get out of Aberdeen and asked him to pay up. By degrees we worked our account down close to a couple hundred dollars. They finally went broke and we lost our money. I afterwards sold in Aberdeen considerably more cement. The only instructions I had from our head office in San Francisco was to stop active solicitation in Washington unless we could make some money on it. We sold in Oregon throughout the Willamette Valley and as far east as we could possibly go and all through western Oregon. I remember the Oregon Portland Cement Company's product first came on the market in the summer of 1916. I had no arrangements of any kind either directly or indirectly with Clark M. Moore, Mr. Hollister, J. E. Moore, or R. P. Butchart in regard to the manner in which I should sell the Henry Cowell Lime Company's cement or the manner in which they should sell the cement of the Oregon Portland Cement Company. [363] During that period we sold anybody. We

(Testimony of G. C. McDonald.)

had the same price to dealers and consumers. We gave a cash discount to both."

Upon cross-examination the witness testified:

"Yes, the inspiration of my letter to Wylie of the Aberdeen Manufacturing Company was that their account was not satisfactory. They were poor pay and I didn't wish to continue doing business with them. I note my letter, Government's Exhibit 39, dated December 28, 1914. They paid their lime and plaster bills very little better than their cement bills."

Upon redirect examination the witness testified:

"Practically they paid their lime and plaster bills no better. Their lime and plaster business was very small."

### **Testimony of Brockwell Statter, for Defendants.**

Thereupon BROCKWELL STATTER was called as a witness on behalf of the defendants and testified as follows:

"I reside in Portland, am local manager of the Pacific Portland Cement Company and have been for ten years. I think during that period I have acquainted myself with the market for cement in Portland. I have sold in the entire Northwest during that ten years, in Washington and Idaho and eastern Oregon as far as Huntington. I think the Oregon Portland Cement Company put its product upon the market some time in June, 1916, as nearly as I can remember. I was acquainted with the

(Testimony of Brockwell Statter.)

market conditions for cement at that time. We issued some price lists but very seldom; sometimes they were a year apart; sometimes oftener. In 1916 four California companies were operating in Portland. The Oregon people came in; the Washington people had been in. I don't remember when the Washington people stopped shipping into this market. It was some time in 1916, I think. There has always been competition here among the cement manufacturers. By competition I mean they were selling at different prices and our company took part in [364] that competition. We tried to get as much as possible for cement. If somebody made a lower price than was being quoted at the time and we wanted the business we would take it. We sold to dealers and consumers alike. There was a time when we paid dealers' commissions and other times when we didn't. I don't remember any particular time when there was any change made in the price.

I have seen this letter (Plaintiff's Exhibit 122). It came from the San Francisco office. Mr. Manning mentioned in that letter is a salesman in our employ. I don't remember where I was when the telephonic communication referred to in that letter took place. We have always sold to dealers in the city of Portland. From this letter I judge we were then paying dealers ten cents a barrel commission and the letter instructed us to advance that commission to fifteen cents a barrel. We didn't sell all the dealers mentioned in that letter at all times. They had been on our list and for various reasons



(Testimony of Brockwell Statter.)

we discontinued selling them. McMillan & Company, Balfour-Guthrie & Company, McCracken & Company, Nottingham & Company, Cherry & Company, and Columbia Digger Company were the principal dealers that we sold, though we sold to others from time to time, but their business was light and didn't amount to much. All other parties mentioned in that letter had been on our books. Generally telephone conversations were had with me direct, but the conversation referred to in that letter was not. I suppose the increased commission was given to meet the competition of the market, that is my recollection. So far as I know other California companies were selling to dealers. I don't know whether other California companies gave dealers commissions or not. In 1916 I sold most in Oregon and a little in Washington as far as I could. I [365] cannot say definitely that we made any sales in Washington that year, but I think we always sold there more or less through every year."

Upon cross-examination the witness testified:

"Without reference to letters I do not remember the dealers' situation in Oregon in the early part or summer of 1916. My recollection is that the Oregon people was the cause of our advancing our dealers' commission in the market because they had increased the dealers' commission. The signature to the letter, Plaintiff's Exhibit 121, I think is Mr. Erlin's. I note the letter from Mr. Erlin to Mr. Clark Moore at Denver. It refers to dealers in Portland in July, 1916. The coming in of the Ore-

(Testimony of Brockwell Statter.)

gon Portland Cement Company does not suggest to me any reason why Mr. Erlin should wish to confer with Clark Moore about the dealers' situation in Portland. The pencil memorandum on Plaintiff's Exhibit 123 is in my handwriting. I remember the first telegram in this exhibit. I sent this telegram. I couldn't find out anything about the matter mentioned in this telegram from the office of the Oregon Portland Cement Company. I asked if the allowance was made and could get no information so I thought if Mr. Clark Moore was in San Francisco, I think he was at the time or was going to be there, Mr. Erlin might be able to find out something from him in San Francisco. I would have asked anybody in the Oregon Portland Cement Company if I could have gotten any information. I didn't think that we were entitled to any explanation unless they wished to give it. We made our commission in August, 1916, fifteen cents to dealers in order to meet the Oregon company's commission. I don't know that they had been giving McCracken and Nottingham twenty cents at that time. I didn't know that they gave fifteen [366] cents. I am only making this statement on the instructions in that letter which we received from California and I assume that was the reason the letter was written."

Upon redirect examination the witness testified:

"I don't remember whether we kept the business mentioned in the telegram about which I have been interrogated."

**Testimony of G. McDonald, for Defendants (Recalled).**

Thereupon G. McDONALD, recalled by the defendants, testified as follows:

“I am secretary of the Oregon Portland Cement Company, was what might be called credit manager, that is to say, checked up the credit of parties ordering cement. I kept the books and credits. I have gone over our books and ascertained how much cement we sold during 1916 up to October 27th in Washington. We sold 2,470 barrels. The first shipment was made June 23. I have also ascertained that during that period we sold in Oregon east of Umatilla and south of Roseburg, including Roseburg, 1880 barrels. This does not include Marshfield sales, some five or six thousand barrels. Marshfield is south of Drain, but not south of Roseburg. Our first shipment to eastern Oregon was on June 17th; it was to Baker, 242 miles east of Umatilla. I first met Clark M. Moore on April 14, 1916, when he was appointed sales manager. I was secretary then. He remained here for a short time at that time. At that time my office was in Oswego and after the directors' meeting I returned to Oswego. I saw him later, either the next day or the following day. I removed our office to Portland on the 25th of May, but Mr. Hollister had been in about ten days getting carpets, telephone, and office fixtures. When Clark Moore was here on his first visit our mail came to Oswego. We had but one office from April 14th to about May 15th

(Testimony of G. McDonald.)

and that was at Oswego. After May 15th our office was in Portland, but this [367] office was not opened until several weeks after Mr. Clark Moore left Portland on his first visit. When he returned to Portland I had an office on the left-hand side; the entrance to the office was in the center and Mr. Clark Moore's office was on the right-hand side of the entrance, all of the offices intercommunicating. I had no supervision of sales during that time. I checked all orders as to credits and arranged the collection of all moneys. I observed in what territory sales were being made and the prices at which the cement was being sold. As soon as invoices were issued I entered them in the books and the invoices were entered within one day at least after the invoice was issued. I collected the money. Mr. Butchart came to Portland about the 14th of April, 1916. He remained only a few days, two or three days. I think he was in Portland the first one or two days in June, 1916. From that time I do not remember his being here until between September 20th and 27th when he came overland by the O. W. R. & N., arriving about 7:30 P. M. and went on to Victoria the same evening about eleven o'clock. Except at the times above stated he was not here at all to my knowledge. During 1916 we sold to dealers only with the exception of railroads. The company's financial condition was bad. We struggled hard to make both ends meet. We had exhausted our credit at the banks, collected our accounts as closely as possible and I was urging Mr.



(Testimony of G. McDonald.)

Clark Moore and the various salesmen to sell as much cement as possible as we had to have the money to keep the plant in operation. In order to run our business at that time Mr. Butchart and Mr. Boettcher of Denver loaned us \$40,000.00. The capital stock of the Oregon Portland Cement Company is \$876,000.00 preferred besides some fractional shares, a total of \$876,311.00 preferred and [368] \$605,600.00 common. Oregon Portland Cement Company acquired the properties of the old Portland Cement Company, as I remember, on December 29, 1915."

Upon cross-examination the witness testified:

"As a rule we sold only to dealers and railroads. There may have been some exceptions. I don't know personally about the quotation made to Inman-Poulsen Lumber Company in July, 1916, nor about the quotations made to the Tacoma Dredging Company for Vancouver, Washington, and Chehalis, Washington. When requests for quotations came in we practically always turned them over to our local dealers in the city of Portland. We sold in Washington prior to the date of the indictment 2470 barrels. Of this 732 barrels was sold before the first of September and before the 29th day of August. Of this cement three shipments were to the S. P. & S., aggregating 481 $\frac{1}{4}$  barrels. These shipments were as follows: Maryhill Land Company, June 23, 122 barrels; S. P. & S. Ry., July 19, 2 barrels; J. D. Bower, Dayton, Washington, July 19, 150 barrels; S. P. & S. Railway, Van-

(Testimony of G. McDonald.)

couver, Washington, July 26, 5 barrels; Maryhill and Company, Maryhill, Washington, August 9, 132 barrels. Maryhill is 114 miles east of Vancouver on the S. P. & S.; Willis R. Lebo & Company, Aberdeen, Washington, 135 barrels; Maryhill Land Company, Maryhill, Washington, August 10, 135 barrels; S. P. & S. Railroad Company, Vancouver, Washington, August 14, 41 $\frac{1}{4}$  barrels, altogether five shipments. I haven't the particulars to show at what prices these shipments were sold and do not remember the prices. I cannot remember this as we issued 1010 invoices from June 9th to October 27. I cannot say without having the invoices in my hand whether the first cut under the \$2.30 price in Washington was after September or not. The shipment to Lebo at Aberdeen I presume [369] is the one we made him pay for in advance."

**Testimony of J. E. Moore, for Defendants.**

Thereupon J. E. MOORE, called as a witness on behalf of the defendants, testified as follows:

"I reside in Denver, Colorado; was connected with the Oregon Portland Cement Company in 1916. I remember dining with my brother Clark in April, 1916, at the house of Mr. Aman Moore. I think the only persons present were Clark, Mr. Aman Moore, his wife and their little girl, possibly eight or nine years old. My attention is directed to the testimony of Aman Moore in regard to that dinner and to the persons present. Clark Moore did not promise Aman Moore that he would not

(Testimony of J. E. Moore.)

carry out any policy which Mr. Butchart had defined and did not give his oath on the square that he would not carry out the combine. Nothing of that kind happened at all."

### **Testimony of Wirt Minor, for Defendants.**

Thereupon WIRT MINOR was called as a witness on behalf of the defendants and testified as follows:

"In 1916 I was a director and my firm, Teal, Minor & Winfree, were attorneys for the Oregon Portland Cement Company, and I looked after most of its legal business. I was made a director when the company was first formed at the solicitation of Mr. Aman Moore. My firm, Teal, Minor & Winfree, had been the attorneys for the Portland Cement Company which the Oregon Portland Cement Company succeeded, and either Mr. Teal or myself had been directors of it. The first notice that I had that Aman Moore complained that there was any combination in restraint of trade in which the Oregon Portland Cement Company was involved was on the evening when Mr. Aman Moore came to my house with his wife and his attorney and his attorney's wife, and gave me a copy of the complaint which he had prepared to file in the state court, and either gave or showed me a copy of [370] an injunction order which he had obtained from Judge Henry McGinn. I don't remember the date, but the papers show it was the 9th of June. Mr. Aman Moore wished me to accept service for the company

(Testimony of Wirt Minor.)

and personally; I refused to do so. He then wished me to accept service of the injunction order and I refused to do so, and told him he could bring the matter to my office the next day. He said the matter was rushed because there was a meeting of directors to be held the next day, at which meeting he was to be removed as vice-president, and he desired to prevent any action being taken at that meeting. I told him Mr. W. A. Johnson, one of the directors, was in the hospital and that unless he, Dr. Smith, Mr. Bates, and Mr. Wilson should attend, there could be no quorum of the Board. I made him no promises; I could make no promises for I didn't know whether the other parties, Dr. Smith, Mr. Wilson, and Mr. Bates, would attend and make a quorum or not. The next day he came to my office and I had a conversation with him. After Aman Moore left my house that night I read the complaint and was rather angry. The next morning I upbraided him for making these charges against me personally. I had told him the night before that I would have Mr. Cotton as my attorney. He told me in the morning that I had been made a party because his attorneys thought it necessary to make all directors parties and particularly because he claimed I belonged to the other faction or was standing in with Mr. Butchart, but that he would see that my name was dropped if it could be done. There was no quorum at the meeting the next day. Those directors who were present adjourned because there was no quorum. At this



(Testimony of Wirt Minor.)

meeting on the next day I asked Mr. Aman Moore to give me all the data he had concerning the charges made in his complaint as I thought it was my duty to find out all I could as I was a director and also attorney for the company. At that time he gave me nothing whatever. He may have told me [371] something about the Hollister letter. I went to the office of the Oregon Portland Cement Company in the Wilcox Building. I think Mr. Moore had told me I could get all the information there which he had. I spoke there with Clark Moore. I also talked on one or more occasions with Mr. Newlands, Mr. George McDonald, the secretary, and probably with some others, but I don't recall talking with others. I also examined the files, particularly all letters passing between Mr. Aman Moore and Mr. R. P. Butchart, examined the files to ascertain what data there was on this subject. I interrogated these parties in regard to the manner in which sales had been made, in regard to the territory in which sales were made, and in regard to the charges Aman Moore made in his complaint. In his talk with me on the day after he came to my house in the evening, Aman Moore gave me no particulars as to the combination charged. I think the complaint which has been offered in evidence is a copy of the complaint which he gave me. The first time I heard or had any knowledge of the alleged conversation between Mr. Butchart and Mr. Aman Moore of which Aman Moore testified, was when he testified upon the trial

(Testimony of Wirt Minor.)

of this case last year. After I had examined the files and consulted the office force I had many conversations with Aman Moore in regard to the alleged combination and insisted upon having all the evidence laid before me. The only information which Mr. Aman Moore gave me was a letter either to himself or to Mr. Newlands in regard to what Mr. Hollister had been doing in Eastern Oregon and in Washington, I think in March, 1916, and possibly the letter of Galbraith, Bacon & Company of about that date. When I went to investigate the papers in the office I didn't know that Mr. Aman Moore had a private file, [372] so didn't investigate it. I didn't know of this private file until he testified here a year ago. I met Mr. Butchart first in 1911, 1912, or 1913. I was called into the city to meet him by Aman Moore. I never met Mr. Clark Moore until the occasion upon which he was made sales manager when I was introduced to him by Mr. Aman Moore. Mr. Aman Moore told me before that meeting that Mr. Clark Moore was a suitable man to be made sales manager and to take charge of the sales. Most of the legal business of the Oregon Portland Cement Company was handled by myself, some of it by Mr. Teal. As director I discussed Aman Moore's charges with Mr. Ballard, Mr. Newlands, Mr. Johnson, and I think briefly at one time with Mr. Wilson, and much later I discussed the matter with Mr. Bates; I think that was after the indictment was found. I also discussed these charges with Mr. Butchart at a later date.

(Testimony of Wirt Minor.)

There was a special meeting of the directors called for certain business, I cannot give the date of the meeting, and at this meeting Mr. Aman Moore I think delivered to each one of the directors one or more papers which were rather voluminous. I glanced at them and then stated that these were matters that could not be taken up at that special meeting. After the business was transacted I asked Mr. Aman Moore what he wished to do about the matter. He said, 'It is up to the directors.' I said, 'Do you wish the directors to call a meeting for the purpose of considering these matters?' He answered, 'It is up to the directors,' or something like that. I do not know of any dummy directors on that board as Mr. Aman Moore has testified. I did not control any members of the Board. I know to whom Mr. Moore refers. No question of compromise was considered at that meeting. At that meeting [373] Aman Moore resigned as sales manager and proposed Clark Moore in his stead. It is my recollection that all of the original Board of Directors were named by Aman Moore. Neither Mr. Aman Moore nor anyone else at the meeting at which Clark Moore was appointed sales manager, or at any other time, stated that he, Aman Moore, had talked to Clark Moore; that Clark Moore had given his word of honor and that he thought he was sincere and would not enter into the illegal combine and that he thought we ought to give him a trial. There never was any conversation of this character had with

(Testimony of Wirt Minor.)

me. I remember the meeting of December 21, 1915, at which Mr. Butchart was made director and at which Mr. Aman Moore resigned as general manager and was made treasurer and put in charge of sales. I am not sure of his being made treasurer at that meeting, but he was put in charge of sales. This meeting was called and held because Mr. A. S. Butchart, who was Mr. R. P. Butchart's brother and had prior to that time been a director and member of the executive committee, and Mr. Aman Moore were not getting on well together, and Mr. A. S. Butchart had made up his mind to leave. I do not remember all the matters over which there was a controversy, but I do know that one trouble was that Mr. A. S. Butchart did not think that Aman Moore should be allowed to do as he pleased without action of the executive committee. Mr. Newlands was not present and did not come here until later. Mr. R. P. Butchart was not at that meeting that I recall. There was a faction at that time in the Board, that is to say, there were differences between Mr. A. S. Butchart who was backed by Mr. R. P. Butchart, and Mr. Aman Moore. I don't know how the Board was divided. I was not a party to any faction and cannot [374] say whether there was a faction, but there were differences. Mr. Cotton and Mr. Teal had charge of the reorganization up to the time of the organization of the Oregon Portland Cement Company. Mr. Cotton acted mainly through Mr. James Wilson and Mr. Teal largely through Mr. W. A. John-



(Testimony of Wirt Minor.)

son, but these two gentlemen were nominated for the Board by Aman Moore, not by myself, and so far as I know, not by Mr. Cotton. The other party to whom Aman Moore referred in his testimony as a dummy, I presume was myself. At that time Mr. Teal and myself had a substantial interest in the company. I did not give orders to any of the directors at any time. Mr. Aman Moore did not discuss his charges with me prior to bringing his complaint, the action in the state court, or obtaining the injunction, and I was very much surprised when I got that visit from him that night. I remember the Bates letters referred to by Aman Moore. He did not give me those letters at the meeting on June 10th or the first meeting thereafter; in fact they had not been written at that time. I have been a stockholder in the Oregon Portland Cement Company since its inception. I have been quite familiar with the conduct of the business of the company since its organization. I think I have attended every directors' meeting and been consulted by the officers of the company upon practically every question which has been discussed between the officers of the company in Portland. As far as I could judge from the conduct of the company I saw no change in the policy of the company doing business after the complaints were made by Aman Moore, after, as he said, he began to make trouble. I know Mr. Boettcher came here and had some conferences with Aman Moore. I don't remember meeting Mr. Morse. I know [375]

(Testimony of Wirt Minor.)

there was some attempted agreement, but I was not present when the agreement was made. That agreement was subsequently discussed in my presence by Aman Moore, Clark Moore representing Mr. Boettcher, and Mr. Harry Ross representing Mr. Butchart. I think they came to me for the purpose of having me, as attorney for the company, call a meeting, if a meeting were necessary to arrange these matters, but I don't think they came together. A telegram dated June 27th, addressed to Mr. R. P. Butchart, was either read or shown to me by Aman Moore at that time. I did not see the other telegram until a few days ago. The paper shown me was either the original telegram or a copy of it."

Thereupon the defendants offered in evidence a certain telegram addressed to R. P. Butchart and signed by Charles Boettcher, E. Possett, and R. J. Morse. To this telegram the United States by its attorney objected and the objection was sustained and the telegram was not permitted to be introduced in evidence, and to this ruling the defendants excepted and the exception was allowed.

### **Testimony of Clark Moore, for Defendants.**

Thereupon CLARK MOORE was called as a witness on behalf of the defendants and testified as follows:

"I am one of the defendants in this case. In 1916 I resided in Denver, Colorado, was in the cement business connected with the Colorado Portland Ce-

(Testimony of Clark Moore.)

ment Company, the Three Forks Portland Cement Company, and the Oregon Portland Cement Company. I believe I became connected with the Oregon Portland Cement Company April 14, 1916. I was first advised that I should be made sales manager of this company in January or February, 1916, when Mr. Butchart came to Denver and consulted with Mr. Boettcher. Mr. Boettcher called me into his office which was adjoining mine and asked me in the presence of Mr. [376] Butchart if it would be agreeable to me to go to Oregon and organize the sales department of the Oregon Portland Cement Company; that the factory was nearing completion and that it would be ready to market its cement some time in the near future, and I said it would be agreeable. I had never met Mr. Butchart before. I do not remember hearing anything more about this matter until about the time when I came out to Portland. I came to Portland in April via San Francisco, came by San Francisco to attend a meeting of the Portland Cement Association, a National association, at the request of Mr. Beck, then general manager of the Association. He was on his way to San Francisco and stopped at Denver. I was then a member of the executive committee of the Portland Cement Association and the meeting was called by the members of the National Association who were members on the west Coast to make a more satisfactory arrangement to those members to care for promotion work being done by the Association on that Coast. I remember that

(Testimony of Clark Moore.)

Mr. Leonardt and Mr. Trainor of the southern California mills, Mr. Cameron, Mr. Henderson and Mr. Erlin I believe of the northern California mills and Mr. Coats and Mr. Eden of the Washington mills were present at this meeting. I don't remember whether Mr. Cameron of the Washington mills was present or not. Mr. Butchart was not present. The Oregon Portland Cement Company was not a member of that Association at that time. I think it joined the 27th of June, 1916. At that meeting there was no discussion in regard to the sale of cement on the Pacific Coast. At that meeting there was nothing said in regard to the territory in which the several manufacturers of cement on the Pacific Coast should sell their cement and nothing was said at that meeting in regard to prices for cement. Matters of that character were never discussed at any meeting of the National Association that I attended. Mr. Eden was also [377] a member of the executive committee. I don't think Mr. George was present at this meeting. He and Mr. Coats are not very good friends. I remained in California at that time from one to three days I should say. I didn't see Mr. Butchart while in California at that time. I talked at that time with officers of the California cement manufacturers and with officers of the Washington manufacturers, but I had no talk with any of them in regard to the manner in which the business of the Oregon Portland Cement Company or their own business so far as selling cement is concerned, or as to the places where cement should



(Testimony of Clark Moore.)

be sold or the prices at which it should be sold. There is a Mr. Rogers who was with the Lehigh Portland Cement Company at that time. I don't remember his being at that meeting. I knew him at that time; I do not remember of seeing him at that meeting. I came to Portland from California, arriving in Portland on April 14th I think; arrived on the same day on which I was elected sales manager. I had not seen Mr. Butchart since I met him in Denver until I arrived in Portland on April 14th and do not remember having had any correspondence with him at the meeting in Denver, Colorado. Nothing was said to me in my presence in regard to the management of the sales department or the conduct of the business of the Oregon Portland Cement Company. I am certain I did not meet Mr. Butchart before the meeting at which I was made sales manager. I had met Aman Moore before that time, in the Denver office probably. I never had any conversation with him in regard to the affairs of the Oregon Portland Cement Company before I came to Portland in April, 1916. He never told me anything about having made any agreement with any of these parties. During the whole time that I was here in April, 1916, Mr. Butchart said nothing to me at all about the territory in which cement should be sold, [378] the prices at which it should be sold, prices at which competitors' cement should be sold, the territory in which competitors' cement should be sold, or about any agreement made with any person. I do not remember when I next saw

(Testimony of Clark Moore.)

Mr. Butchart after April 14, 1916. I don't think I saw him in June, 1916. If I did see him in June, 1916, I had no conversation with him in regard to the manner in which I should conduct the sales department of the Oregon Portland Cement Company, the territory in which I should sell its product, the price which I should ask for its product, the territory in which the Washington mills should sell their product, the territory in which the California mills should sell their product, or the territory in which any of them should sell their product, or the prices at which any of them should sell their product. Mr. Butchart told me nothing at all about having any agreement with any of these parties, either the California manufacturers or any of them, or the Washington manufacturers or any of them. I do not recall having seen Mr. Butchart at any time during the summer of 1916 or at any time after seeing him in April, 1916, prior to the 27th day of October, 1916. I met Aman Moore in April, 1916. I met him at the Portland Hotel. I had a conversation with him. He told me there was trouble between himself and Mr. Butchart and this was the first time that I knew of that, and he tried to find out whether I would be on his side or not. He said there had been trouble between Mr. Butchart's brother and himself in regard to the factory; that this was where the trouble seemed to arise. He didn't say anything at all about having had any conversation with Mr. R. P. Butchart in regard to the manner in which the busi-

(Testimony of Clark Moore.)

ness of selling cement here should be conducted. He didn't say anything to me about having a conversation with Mr. Butchart [379] nor claim that he had had any conversation with Mr. Butchart in regard to the territory in which the Oregon Portland Cement Company should sell its product; if he had I should have remembered it. Aman Moore did not say anything to me in regard to where the California cement manufacturers or any of them should sell the product of their mills and said nothing to me in regard to the prices at which the California cement manufacturers or the Washington manufacturers or any of them should sell their product. Mr. Aman Moore did not have a discussion with me as to any arrangement made by Mr. Butchart in San Francisco in regard to price and territory. He did not ask me if I intended to carry out any such an agreement and I did not give him my promise or oath that I would not. Nothing was discussed between myself and Mr. Aman Moore in regard to any alleged agreement made by R. P. Butchart. I did not give Aman Moore my promise or oath that I would not carry out any agreement; he didn't ask me to. Aman Moore did not direct my attention to the details of any agreement, he did not tell me that any agreement had been made whereby the territory of the Oregon Portland Cement Company should be restricted to the Columbia River on the North, Umatilla on the east and some point around Roseburg on the south. There was no conversation of that character and he made no statement of that char-

(Testimony of Clark Moore.)

acter to me. Aman Moore did not say anything to me about the removal of Mr. Hollister. Aman Moore did not mention any inquiries which had been made for cement at that time so far as I remember. He did not discuss the situation with me or anything pertaining to the alleged combine nor these inquiries or inquiries from the territory in which we were not supposed to ship or quote. Our conversation was not very long. We couldn't have discussed these matters in detail [380] for we only talked a few minutes, not more than twenty or thirty minutes, and this just before the meeting at which I was elected sales manager; then Mr. Butchart came along and nothing more was said. We went to the meeting together as I remember and nothing at all about these matters was said as claimed by Aman Moore. Aman Moore invited my brother Joe and myself a few days afterwards to his house for dinner at Oswego. He invited me to dinner and I told him my brother was coming from Seattle; that I hadn't seen him for a number of years and that he was going to spend Sunday with me, so he extended the invitation to my brother also and we took dinner with him and Mrs. Moore. At the dinner Mr. and Mrs. Moore and possibly their little girl, my brother Joe and myself were present. At that dinner I did not make him any promise or make him any oath or make him any oath on the square that I would not carry out any combine. Nothing was said in regard to that matter; it wasn't even mentioned. I am not a Mason and was not a



(Testimony of Clark Moore.)

Mason at that time; have never been a Mason. I hoped to be a Mason at one time but lost my arm and since then have not been able to become a member. I came to Portland again in June, 1916, the latter part of May or the first of June. I remember meeting Mr. Aman Moore also at the hotel on my first visit to Portland in April, 1916, on the day that I left Portland. I called up Mr. Jack Eden that day by phone. I called up Eden while Aman Moore and I were together and no one else was there. I called him up because I was in a hurry to get to the train. My object in calling him up was to say to him that I had been elected sales manager of the Oregon Portland Cement Company and that this company would become a member of the National Association of Portland cement manufacturers. He was then a member of [381] the executive committee, the same as myself. I do not remember telling Mr. Eden or Mr. Coats that they need have no worry, that everything would be carried out O. K. I may have said that the Oregon Portland Cement Company would co-operate and carry on the work of the Association; whatever I did say had reference entirely to the work of the Association and to nothing else. By work of the Association I mean work in promoting the use of cement. I don't think I had any talk with Mr. Coats at that time over the phone. If I did my talk with him was about the same as my talk with Mr. Eden and also was in reference entirely to the work of promoting the uses of cement as carried out by the

(Testimony of Clark Moore.)

National Association, and about the Oregon Portland Cement Company joining this Association. At the meeting which we had held in San Francisco a week or so before, one of our objects was to try and enlist the support and membership of all the manufacturers on the Coast as the Coast manufacturers were not entirely satisfied with the way the National Association was dividing the funds in promotion work and therefore it was desirable to have very manufacturer on the Coast a member of the Association. I left Portland soon after I arrived in April, 1916, and went to Denver and came back to Portland the latter part of May or first of June. I came by way of San Francisco; I came by way of San Francisco upon a personal matter that I had to attend to there with a nephew of mine. He was not interested in the cement business; he is in a bank and the matter to which I had to attend to with him had nothing to do with the cement business, but was purely personal. I went to Los Angeles to see him. I didn't see anyone else that I remember of while I was in Los Angeles. I went from San Francisco to Los Angeles, that is to say went to Los Angeles [382] by way of San Francisco. I did not meet Mr. Butchart in San Francisco on that trip. I had not seen him since I met him in April, 1916. On that trip I called at the offices I think of the Henry Cowell Company, the Pacific Portland Company and the Santa Cruz Company. My calls were merely social to pay my respects to these officers. I met Mr. Cameron and

(Testimony of Clark Moore.)

Mr. Muhs of the Santa Cruz and Standard Portland Cement Companies, I met Mr. Henderson of the Pacific. I did not meet Mr. Erlin that I recall, nor any officer of the Cowell Company. I may have had some talk with these gentlemen about the cement business in a general way. I transacted no business with them at all and had no conversation with them in regard to the manner in which the business of the Oregon Portland Cement Company should be conducted by me. I had no talk with them in regard to either the territory in which I should sell the Oregon cement or the territory in which they should sell the product of their mills. I had no talk with them or any of them in regard to prices at which I was going to market the Oregon cement or the prices at which they should market the product of their mills. At that time I had not heard anything at all about any division of territory or about fixing prices on the Pacific Coast. I did not meet any of the Washington Portland Cement Company manufacturers down there at that time and I did not meet Mr. Rodgers there at that time. The matter of my having become sales manager of the Oregon Portland Cement Company came up in the office of the Santa Cruz company. I do not remember but I probably said I was on my way to Portland to take charge of the office. I remember Mr. Muhs said that he had a schedule of freight rates applying to the Portland territory, freight rates that carried cement out of Portland and volunteered to give me a [383] copy of the schedule and I was

(Testimony of Clark Moore.)

very glad to have it. I think he mailed it to me afterward. Nothing was said about his giving me any schedule of prices or price list. Nothing was said about prices at all. When I got to Portland about the first of June I took charge of the office. In my absence I had left Mr. Hollister in charge, told him to get together the necessary equipment for the office, also schedule of freight rates applying from Portland, also schedule of freight rates applying from the mills of our competitors. I don't remember saying anything to him at that time about issuing any circular letters. I remember the circular letter which Aman Moore issued some time the early part of 1916. He called my attention to this during my stay in Portland in April. There were some replies to that circular letter but nothing like so many as a hundred. I didn't do anything about the circular letter when I was here in April as I didn't think it was good business to do anything toward soliciting business or selling cement at that time. I didn't know when this factory would have cement for sale. My plan was to have the cement on hand ready to sell and know absolutely we could fill the orders if we received them, for my experience shows that there is nothing so detrimental as to take orders and fail to fill them. When I came back in June I took charge of the sales office and started Mr. Hollister to work there and employed my brother and Mr. Wellman and began trying to sell Oregon cement. I issued a letter, a typewritten letter and sent it I believe to all the people to whom



(Testimony of Clark Moore.)

we hoped to sell cement that we knew of at that time. I call it a form letter and think such a letter carries more weight than a circular letter. I sent these letters all over Oregon and into Washington. I don't know what territory [384] exactly, but I know I sent them into southwestern Washington. The territory into which I sent these letters was governed principally by the freight rates. I mean that where freight rates are such that it makes it entirely unprofitable for us to sell cement because other manufacturers have a lower rate to these points it would be unnecessary for us to send letters to that territory. We got out some literature, propaganda on home product, trying to impress the people of Oregon that we would appeal to them for business as an Oregon institution. I cannot remember all the literature which I got out but we did appeal to people in Oregon to patronize us as an Oregon company. I sent out two travelers, my brother and Mr. Wellman. I gave them no limitation as to where they should go. We secured three dealers to handle our cement in the city of Portland. By dealers I mean parties to whom we sold cement and they resold it to their customers. As nearly as I am able to ascertain the prices that our competitors were making in the city of Portland we made these three dealers a lower price. We ascertained the prices made by our competitors in the city of Portland from salesmen investigations and inquiries and published price lists, I believe some of them had such at that time. I do not recall how

(Testimony of Clark Moore.)

much inducement we offered to these dealers. If there was a meeting of California manufacturers in San Francisco in May, 1916, I know nothing about it and never did know anything about it. I do not know anything about a new price schedule which Aman Moore testified was sent out by all California companies from the Portland office under date May 29, 1916. If such price list was sent out I know nothing of it. I don't know what Aman Moore means by the term 'fixing his own estimate in the city of Portland.' There [385] was no meeting in California in May, 1916, that I know of. I did nothing at that time in regard to fixing any estimate in the city of Portland or prices or anything else. I know nothing about any price schedule having been agreed upon at that time. If there was any such agreement I had nothing to do with it. I didn't have anything to do with the price lists which Aman Moore testifies was prepared and later sent out as a freight schedule signed by Fred Muhs. If it was prepared and sent out I know nothing of it. I didn't have anything to do with Fred Muhs or with any such schedule. When I came back in June, 1916, I was here I believe the full month of June. When I left I went directly to Denver. I was here when Aman Moore prepared some papers for filing a suit in the State Court and prepared a temporary restraining order or injunction in June, 1916. Prior to that time I had not heard any complaint made by Aman Moore in regard to the prices at which the Oregon Portland Cement Company should

(Testimony of Clark Moore.)

sell its cement or in regard to the prices at which other companies should sell their cement or in regard to the territory in which the Oregon Portland Cement Company or other cement companies should sell their products. I remember about that time of having an inquiry from Galbraith, Bacon & Company. When I got this inquiry I called up Mr. Eden of the Superior by phone, asked him whether Galbraith, Bacon & Company were dealers and what the market price of cement was in Seattle at that time. I don't know what he said but I know the price was lower than I fixed to get for our cement in Portland. I think Mr. Nickerson was in my office when this inquiry by telegram came from Galbraith, Bacon & Company, Nickerson of the Washington Portland Cement Company in Portland, and that I showed him the telegram or told him of it and knowing that [386] he was in the cement business and selling for the Washington Company thought he would know the price of cement in Seattle and asked him. He said he didn't know the price of cement in Seattle and suggested that I call up his Company and I called Mr. Eden instead. I had a talk with Aman Moore in regard to that matter afterward within a day or two. After this suit was brought and after Aman Moore had made his complaint I made no change in my policy in selling the product of the Oregon Portland Cement Company. I next went to California in August from Portland, had been in Portland from about the 20th of July up until the 9th of August. Before

(Testimony of Clark Moore.)

going I had tried to sell all the Oregon cement I could and thought we had done pretty well. The financial condition of the Oregon Company was very bad. I learned of this from the secretary and from Mr. Newlands who was general manager and from others. It was at that time that I asked Mr. Boettcher to send us \$10,000.00 which he did and Mr. Butchart had already guaranteed a loan or overdraft for \$15,000.00. On the day I left Portland, on the 9th of August, Mr. Ross, connected with Mr. Butchart, his son-in-law, I believe, was in Portland and he and I took the responsibility of guaranteeing to the Ladd & Tilton Bank any further overdraft or loan that might be needed by the Oregon Portland Cement Company until a meeting of the stockholders of the Company that was to be held in September. I was very well acquainted with the embarrassment of the Company for money at that time. They were accumulating some cement. The factory was operating better than I anticipated and we were manufacturing more cement than we could sell and were trying to devise some way to dispose of this cement and get the money for it. We had to have the money as fast as we sold it almost in order to [387] operate. I had two plans which I had talked over with Mr. Boettcher when he was in Portland the latter part of July. One was to try and dispose of a cargo of cement in San Francisco to some responsible party there. We had in mind a Mr. Howard of the Howard Mercantile Company, quite a large stockholder of the Oregon Com-



(Testimony of Clark Moore.)

pany and we thought he might buy a cargo and if he did he had the money to pay for it and this we needed. The other plan I thought of was to establish other dealers in town, dealers who were not then handling much of our cement, so I went to San Francisco on my way to Denver for this reason principally. I had of course other reasons for going that way. I took up the matter of the Association work here with the Association office in San Francisco, this with Mr. Hiltz as I had done on my former visit to San Francisco. Another matter which took me there was that Grant Fee, a contractor in San Francisco, had secured the contract for building the postoffice in Portland. Bids for that job were open in Washington, D. C., on August 7th, and I was immediately notified by wire that Mr. Grant Fee was a low bidder so I wanted to see him and see if I could secure the order for the cement to be used in the postoffice. I may have had other business—I don't remember. I arranged in the event that we couldn't make the sale in San Francisco we would notify a list of people whom we proposed to put out as dealers, made the list before I left Portland in consultation with Mr. Hollister, Mr. Wellman and my brother so that they could do this as quickly as possible before our competitors would know anything about it. I saw Mr. Howard particularly about selling our cement in San Francisco and saw other dealers there whose names I do not now recall; saw Mr. Howard twice and learned from him [388] that they would buy our cement

(Testimony of Clark Moore.)

as they were stockholders and anxious to help the Company along, but couldn't afford to pay more for cement than he was then paying. I did not accomplish anything toward selling the cargo. I attempted to sell the cargo instead of pressing sales up in this country because the car situation was such that we could barely secure cars enough to take care of the orders that we were able to get in the country and in fact we were then either bargaining in the cement from the factory or contemplating it. Cars were almost impossible. The car situation was such that we couldn't get a sufficient number of cars to take care of any quantity of cement to Tacoma, Seattle or other places in Washington and there were no boats plying between Portland and Seattle as I learned. When I found I couldn't sell this cement in San Francisco I telephoned my brother to see the dealers as we had arranged as quickly as possible before any of our competitors would know of it. I got an answer from my brother the same is Plaintiff's Exhibit 135. I did not see Mr. Fee but I talked to him by telephone. I had had some correspondence with him and had a telephone talk with him which answered the purpose, but did not see him."

Thereupon the defendants offered in evidence telegram from the witness to Grant Fee and letter from Grant Fee, marked Defendants' Identifications 112 and 113 but the United States objected to the introduction of such papers and the court sustained the objection and did not allow the papers

(Testimony of Clark Moore.)

to be introduced in evidence, and to this ruling the defendants excepted and the exception was allowed.

“I also saw Mr. Hiltz on that occasion. I wanted him to come to Portland and arrange for an inspector on some road work that was being done here so that we might know that [389] the work was properly done according to specifications.”

Thereupon the defendants offered in evidence certain telegrams relating to this matter, marked Defendants’ Identifications 114 and 115 but the United States objected to the introduction of the same and the court sustained the objection and excluded said papers and to this ruling the defendants excepted and the exception was allowed.

“I notified my brother when I would leave San Francisco and how he could reach me.”

Thereupon the defendants offered in evidence a certain telegram marked Defendants’ Exhibit 116, dated August 15, 1916, and the same was introduced in evidence and read to the jury.

“On that trip to San Francisco I did not see any of the officers of the California cement manufacturers. I did not see Mr. Erlin of the Pacific. I remember the letter offered in evidence of Mr. Erlin asking me when I came to Portland to come via San Francisco. I did not answer that letter to my knowledge. I don’t know what business he referred to. I never took up this matter with him afterward. I never have had any conversation with any of the officers of the California

(Testimony of Clark Moore.)

cement manufacturers or with any of the officers of the Washington cement manufacturers in regard to the territory in which I or they should sell cement. I never had any conversation with any of the officers of the California cement manufacturers or with any of the officers of the Washington cement manufacturers in regard to any alleged agreement which they had with Mr. Butchart either in regard to the territory in which cement should be sold or the prices at which it should be sold. I identify this letter; I wrote it." [390]

The same was offered in evidence, marked Defendants' Exhibit 117 and read to the jury.

"I also identify these letters; I wrote both of them."

The same were offered in evidence marked Defendants' Exhibit 118 and 119 and read to the jury.

Upon cross-examination the witness testified:

"I cannot say definitely whether I wrote the letter to Mr. Boettcher dated May 18, 1916, or not. It is not a carbon copy. It purports to be excerpts from a letter of mine to Mr. Boettcher dated May 18th, 1916. It may be all right, I cannot say."

"Mr. HUMPHREYS.—Well, I am prepared to show it is a copy of a letter you wrote. I might say this, if the court please, in explanation of not producing the original. It was my information that Mr. Clark Moore would not be at this trial, and as a matter of fact, first he was in South America, and I understood he would not be here at all. Then later Mr. Minor came to me and



(Testimony of Clark Moore.)

said he wanted to take Mr. Moore's deposition in evidence of the trial so it could be used, and he would not have to stay here, and it was not until I was in the midst of the Hazelwood case in this court that I learned Mr. Moore was going to remain here for the trial; that is why I did not issue a *subpoena duces tecum* to produce the original letter, which is in Denver in the office of Mr. Boettcher, but the man who made that copy is here, and I can prove by him that it is a correct transcript *pro tanto* of the original.

"Mr. MINOR.—I don't see anything relevant to it, or competent.

"Mr. HUMPHREYS.—There is only one paragraph I want. This part in the middle beginning 'I am going to Portland via San Francisco.' [391]

"Mr. MINOR.—I don't think it is competent.

"COURT.—Do I understand the objection goes to—

"Mr. MINOR.—Goes to the competency and relevancy; we don't deny he went via San Francisco.

"COURT.—What I want to know is whether you object to the form of the document or to the competency of the evidence.

"Mr. MINOR.—On Mr. Humphreys' assurance that he can prove the document I will waive that.

"COURT.—I think it is competent.

"To which ruling the defendants then and there saved the exception which exception was allowed and the letter was received in evidence and marked

(Testimony of Clark Moore.)

Plaintiff's Exhibit No. 163, from which the United States Attorney read to the jury the following:

"I am going to Portland, Oregon via San Francisco where I will see our friend and I am very much pleased to have received letters since I saw you from Mr. Erlin of the Pacific Portland Cement Company and Mr. Muhs of the Santa Cruz Company, asking if it would not be possible for me to go to Portland via San Francisco, so as to discuss matters of interest."

Thereupon the defendants offered in evidence the remainder of said letter or of the excerpts from said letter, and thereupon the United States agreed that the entire letter should be marked as an exhibit on the part of the United States and offered as its exhibit, subject to the objection [392] and exception heretofore taken.

Thereupon in answer to question by attorneys for the defendants the witness further testified:

"This telegram offered in evidence heretofore, sent by me to J. E. Moore about the first of September in answer to his telegram about directors and attorneys kicking about our not selling in Vancouver, I recall this telegram. I got it out of our files which were held by the District Attorney's office when I came to Portland."

Thereupon the defendants rested.

Thereupon the United States rested.

Thereupon the cause was presented to the jury by counsel for the respective parties.

Thereupon the court charged the jury as follows:

### **Instructions of Court to Jury.**

R. S. BEAN, District Judge:

Gentlemen of the Jury: It now becomes my duty to advise you of the rules of law by which you shall be guided in arriving at your verdict. You have heard the testimony and arguments of counsel, and are in possession of the facts, and with the construction placed upon the testimony by the various counsel. In our system of the administration of justice the court decides all questions of law and directs the jury as to the law of the case. It is your duty to accept its statement as to the law, whether it conforms to your views or not. It is your peculiar and exclusive province, however, to pass upon all questions of fact, and by your verdict determine all questions of fact involved in the case. With this duty the court has no concern and no right or desire to interfere.

The indictment upon which the defendants are being [393] tried is for a violation of what is known as the Sherman Anti-Trust Act. It contains two counts; the first charges that certain named parties, some seventeen in number, I believe, who were the managers or representatives of cement manufacturing concerns in the states of Oregon, Washington and California, entered into an unlawful combination or agreement in restraint of trade, by the terms of which they were to mutually fix the price at which their product was to be sold, and define or prescribe the territory in which each should do business. You will have the

indictment, and can examine it at your leisure to ascertain the details of the statement. For the present purposes what I have said is, I think, sufficient. The second count charges the same parties, by means of the same arrangement and combination, with monopolizing the trade in cement in these several states.

While there are a large number of defendants named in the indictment, but two are on trial at this time, Mr. Butchart, the President, and Mr. Clark Moore, the Sales manager, of what has been referred to throughout the trial as the Oregon Company. The other defendants are not on trial. Mr. Butchart and Mr. Moore have each made a plea of Not Guilty, and that plea constitutes a denial of every material allegation of the indictment, and imposes upon the government the duty of proving each and every one of these allegations to your satisfaction, beyond a reasonable doubt, before you will be justified in finding a verdict of guilty. The defendants are presumed to be innocent, and this assumption continues with them throughout the trial, until it is overcome by the testimony. They are not required to prove their innocence, but the burden is on the Government to prove their guilt, and to prove it beyond a reasonable doubt. By [394] a reasonable doubt I do not mean a mere possible doubt, nor a captious doubt, but I mean a real substantial doubt, which would cause a prudent man to hesitate to act in his own important affairs. Proof beyond a reasonable doubt, is that state of a case which leaves



the mind of a juror in such a condition that he does not feel that he has an abiding conviction to a moral certainty, of the truth of the charge. And if, after you have considered all the evidence in this case, under the law as I shall give it to you, you do not entertain such a doubt, it will be your duty to find in favor of the Government. If, on the other hand, you have such a doubt, it is your duty to give the benefit of it to the defendants and acquit them. The indictment is no evidence of guilt. It is a mere formal method or manner provided by law under which or by means of which parties accused of a crime are placed on trial before a trial jury. It does not infer guilt, and is no evidence of guilt, and should not be so construed by you.

In the progress of this trial the Government relied to a large extent upon circumstantial evidence, that is, not direct and positive evidence of the facts charged. Circumstantial evidence is defined to be that which does not directly prove the issue, but which tends to do so only by proof of facts sustaining by their consistency the hypothesis claimed, and from which a jury may infer or deduce the principal fact. It is composed of facts which raise legal inferences, and by a chain of such inferences lead to the ultimate conclusion which is sought to be established. A conviction in a criminal case can as well be had upon circumstantial evidence as upon direct evidence, but to warrant a conviction upon evidence of that character, the proven facts must not only be [395]

consistent with the hypothesis of guilt, but inconsistent with any other reasonable hypothesis. Evidence of facts that are as consistent with innocence as with guilt, is insufficient to sustain a conviction. Unless there is substantial evidence of facts which excludes every other hypothesis but that of guilt, it is the duty of the jury to return a verdict for the accused, and it is your duty to reconcile, if you can, the proven facts with the theory of innocence.

Keeping these general rules of law in mind, you should next consider, under the interpretation I shall give, the provisions of the law with the violation of which the defendants are charged. It is entitled an Act to Protect Trade and Commerce against Unlawful Restraint and Monopoly. Section one therefore provides that every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction shall be punished accordingly. Section two of the Act provides, as far as material here, that every person who shall monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and upon conviction, punished accordingly.

The first count in the indictment, as I have said, is based on Section one of this statute which I

have just read to you, and the second count upon Section two, prohibiting monopoly.

Now the law does not compel a dealer or manufacturer to offer his product for sale in any given territory, or to [396] any particular person, or at any particular or definite price. He has a lawful right, so far as this statute is concerned, to select the place where, the person to whom, and the price at which he will sell his products, provided always he does not do so as the result of an understanding or agreement with his competitors, to restrain or prevent competition. Again, a manufacturer may offer his product for sale at the same price, and on the same terms, and in the same territory as competitors, and not be guilty of a violation of this statute, in the absence of such an agreement or understanding. As you have observed, Section one of the statute which I read to you condemns three distinct evils, first, contracts in restraint of trade; second, combinations in restraint of trade; and third, conspiracy in restraint of trade. Count one of the present indictment is based on that subdivision of the section which condemns combinations in restraint of trade. It charges, in substance, that the parties named in the indictment entered into an agreement or understanding to the effect, first, that the California companies would not sell their products in the state of Washington; second, that the Washington companies would not sell their product in Oregon or California; third, that the Oregon Company would not sell its products in Washington or California; and fourth, that in

Oregon, west of Cascade Mountains, sales to be without competition as to price. Further details of this alleged agreement are stated in the indictment, which you will have and can examine at your leisure. You will observe that it is not charged that by this agreement the Oregon Company's territory was limited to point north of Drain or Roseburg, nor by the Deschutes River, or the town of Umatilla on the east; but the charge is that the agreement was that the Oregon Company would not sell in Washington, that [397] the California and Washington companies would not sell in the state of Oregon. The geographical points to which I have alluded, are material in this case, only as bearing upon the credibility of the witness Aman Moore, who testified to an alleged conversation that he had with Mr. Butchart, one of the defendants, in reference to the division of territory, but if you find from a consideration of the whole case, that the defendants, Butchart and Clark Moore were, and became parties to an agreement excluding the Washington companies from Oregon, and the Oregon Company from Washington, and restraining or limiting competition in Oregon as between the Oregon and California companies, and by this is not meant that competition must have been entirely abolished, but substantially restricted or limited, then you would be justified in finding against the defendants. To justify a conviction, however, under this count, it must appear to your satisfaction beyond a reasonable doubt, first: That two or more parties charged,



and that includes the officers and representatives of the Washington and California companies, entered into a combination, agreement, or conspiracy, to sell and dispose of the products of the concerns which they represented, in the states of California, Oregon and Washington, or any two of these states. And second: that the effect of such combination was to restrain trade in such products, between such states. And third: that the defendants on trial, Butchart and Moore, one or both of them, were parties to such combination or agreement, or became such during its existence. The statute does not make the doing of any act, other than the act of combining, a condition of liability.

Now the word combination, as used in this statute, has no technical meaning. It signifies no more than co-operation [398] in the pursuance of a common understanding, or the union of effort, and the law is aimed at the result or effect of such united effort or co-operation. To establish a combination it is not necessary that there shall be an express or formal agreement between the parties, nor is it essential that direct and positive proof be made of a direct understanding or agreement to do the forbidden act. It may be entered into in a very informal way. The parties may not get together at all. They may be in different parts of the country. But if by means of correspondence, conferences, or any means whatever, they come to a mutual understanding to do the forbidden act, it is enough. A combination may be,

and is usually, shown and proven by circumstances. Persons contemplating committing a crime, or entering into an unlawful agreement, do not ordinarily place their intentions or contracts in writing, or enter into any formal arrangements, but their agreements, or understandings, are generally to be determined from their acts and conduct, and the entire circumstances surrounding their relationship, transactions and dealings. The existence of such a combination is, and may be deduced from the entire situation and the practical workings and result of the methods of doing business, as disclosed by the testimony.

To come within the provisions of the statute, a combination or agreement must affect and operate directly upon commerce among the states, or with foreign countries. It is not sufficient that it affects only the commerce within a single state; it must be interstate or foreign commerce. Interstate commerce, within the meaning of this law, includes the purchase and sale of articles that are intended to be transported from one state to another, and includes every species of commercial intercourse among the several states. [399] The term comprehends intercourse for the purpose of trade, and in any and all of its forms, including transportation, purchase, sale and exchange of commodities between citizens residing and domiciled in different states. By this test you will determine whether the combination alleged, if proven, directly and necessarily affected commodities used in interstate commerce. If you find that cement was or is the sub-

ject of intercourse and traffic between different states, it will be your duty to find that it was the subject of interstate commerce, within the meaning of this law. And if you find a combination was entered into between the parties charged, effecting such commerce, it will then become your duty to determine whether such combination was in restraint of such commerce.

The statute does not denounce every combination or agreement affecting interstate commerce, but only such as restrain such commerce by preventing or obstructing free flow thereof between the states, and thus depriving the public of the benefit of unrestricted competition. The purpose of the statute is to prevent the stifling and substantial restraint of competition in interstate or international commerce.

In the judgment of Congress the public convenience and the general welfare will best be served when the natural law of competition is left undisturbed by those engaged in interstate commerce. And it was this theory that prompted Congress to pass the law under which the present indictment is framed.

The test of the legality of a combination is its direct and necessary effect upon such competition. If the necessary effect is but incidentally or indirectly, to restrain competition, while its chief result is to force the trade and [400] increase the business of those who make and operate it, it is not a violation of this law. But if the necessary effect is to stifle, or directly and substantially to

restrain free competition in commerce among the states, it is a combination in restraint of trade, and falls within the ban of the statute. Therefore any combination or agreement between persons engaged in interstate commerce, which has that effect, is unlawful, and the criterion as to whether any combination falls within the prohibition of the statute, is the effect upon interstate commerce. It need not be the total suppression of trade. It is enough if its necessary operation tends to restrain such commerce by stifling and preventing competition, and thus depriving the public of the advantage flowing from free competition. Therefore a combination between competing manufacturers, to apportion the territory to be served by them, and to fix the price at which their commodity shall be sold, is within this statute. The necessary effect of such an arrangement is to stifle or restrain free competition between the parties engaged in such commerce. Positive evidence of such an agreement to divide territory and fix prices, is not required. Such a rule would, in almost every case, operate to defeat the enforcement of the law. It would be difficult, if not impossible, in many cases, to produce witnesses who would or could testify that such a combination was formed, and that its purpose was to divide territory, or to control prices. It is sufficient to show that two or more separate and independent concerns have been selling the same article in competition with each other, and that it was sold at a fixed price by each, whether the price was the same or different, and then to show by



proof of circumstances, that the several concerns so engaged, formed a combination or agreement [401] fixing certain definite prices for the respective states involved, and to divide the territory their concerns were serving. The natural effect of competition, in its broadest and legal sense, is to increase trade. To suppress such competition restrains, hinders and obstructs trade, within the meaning of the law. Parties to a combination for such purpose are presumed to intend the natural result of their acts, but neither their actual intent, nor the degree of restraint imposed, can withdraw their acts from the denunciation of the statute.

Nor is a combination which is charged to be in restraint of trade, to be tested by what has been done under it, but what may be done. It is therefore no defense to the illegality of such combination that a complete monopoly has not been formed, or that no control of prices has in fact been exercised, or that prices have been lowered and not raised.

Now the Government is not required, in this case, to prove that the combination was formed at any particular time or place, provided that it was entered into within three years prior to the finding of the indictment, and continued until after the Oregon company began marketing its product.

If you believe, beyond a reasonable doubt, that within three years prior to the finding of the indictment in this case, a combination in restraint of interstate commerce was entered into between two

or more of the representatives of the Washington and California concerns, it then becomes necessary for you to determine whether the defendants on trial, Butchart and Moore, were or became parties thereto during the existence of the combination. If you do not believe beyond a reasonable doubt that such a combination was [402] entered into by the representatives of the Washington and California concerns, then of course there was no illegal combination. It is claimed by the Government, if I understand it, that a combination between the Washington and California companies was entered into some time during the year 1914, and continued from that time until the filing of the indictment on October 27, 1916. If, after such a combination was formed, if it was so formed, and during its existence, the defendants on trial, that is Butchart and Moore, with knowledge thereof, joined in and agreed to aid and assist in its execution, they became as much parties thereto from that time on as if they had been one of the original parties. To join in a combination already formed, is covered by the statute.

Now the Oregon Company, as a corporation, is not on trial, but Mr. Butchart and Mr. Moore, who were respectively President and Sales Manager of the company, are the defendants now being tried. If they authorized or entered into an arrangement between the company which they represent, and the other cement concerns, to restrain trade in interstate commerce, within the meaning of that term as I have defined it to you, they would be charge-

able with the acts of the Oregon Company in carrying out such arrangement.

If, however, at the time the Oregon Company was ready to market its product, it found an established price for cement, made by its competitors, it had a right, without violating the law, to conform thereto, and to sell its products at the same price, or to confine its operations to any certain or particular territory, provided it was without any combination or arrangement, or agreement, with its competitors. Every manufacturer has the right to ascertain in any legitimate way, the prices at which goods manufactured by others and [403] competing with its product, are sold. Competing manufacturers issuing price lists from time to time, may lawfully exchange their respective prices. They may lawfully advise one another of the prices at which their respective products are put upon the market; giving and receiving such information, unless it is in pursuance of some understanding or agreement between the parties, is not forbidden by law, but in considering the guilt or innocence of the defendants in this case, you have a right to take into consideration, and it is your duty to take into consideration, the fact as developed by the testimony, in reference to these matters, and give them such weight as you may think them entitled to. Every manufacturer also has the right to determine from time to time the territory in which, the parties to whom, and the prices at which, and the manner in which the products of his concern shall be sold. He may also issue price lists and

circulars, and employ any other method he may desire, to advertise or sell the product of his mill. Such conduct, of itself, is not in violation of the statute under which the defendants are indicted, or in contravention of the law, but you have a right, and it is your duty, in considering the issues in this case, to give such weight as you may think the facts are entitled to, as tending to show a combination or agreement between the parties.

It is therefore not enough to justify a conviction, that the Oregon Company sold its products at the prices prevailing at the time it entered the cement market, if it did, or indeed that it sold its products at prices higher or lower than the prices prevailing. Such conduct on its part may be entirely consistent with innocence, and is not of itself sufficient to establish guilt.

Persons engaged in trade are not compelled to engage [404] in interstate commerce. They may sell their merchandise within any territory they may elect, and if, therefore, you should find that the defendants were not parties to any agreement not to sell the product of the Oregon Company either in Washington or California, the mere fact that they did not sell in any of such states, or that they did not undertake to solicit business in either of such states, is entirely consistent with their innocence. However, in determining whether in fact there was such an agreement, their conduct in selling their cement is a material fact to be considered by you in the connection with the other facts and circumstances in the case, and if from a con-



sideration of the whole case you find there was an agreement not to sell or quote in Washington except at a price higher than that quoted by the Washington companies, you will be justified in finding against the defendants, provided that the defendants Butchart and Moore became parties to such an agreement.

In determining the guilt or innocence of the parties now on trial, you should take into consideration the conditions existing at the time the Oregon Company commenced marketing its products. If you find from the evidence, at that time or before any cement was placed upon the market by the Oregon Company, the price of cement had been theretofore established in the Oregon and Washington market, without the concurrence of Mr. Butchart or Mr. Moore, or either of them, and that the cement of the Oregon Company was marketed under the conditions as they then existed, without any agreement on the part of Butchart or Moore, to become parties to any understanding which may have been made theretofore by the California and Washington companies, and that neither Butchart or Moore became parties to any such agreement that had theretofore been [405] made, you should find them not guilty.

This does not mean, however, gentlemen, that you may not consider the relationship of Butchart to the former company, the Portland Cement Company, to which the Oregon Portland Cement Company was successor; in determining the guilt or innocence, of the defendant Butchart, you may con-

sider his activities in connection with the plant at Oswego under both corporations, and the change of corporate organizations or name does not limit your consideration to the time subsequent to the formation of the last organization; nor does it mean that the fact of conforming to the then quoted prices, if you believe they did conform to them, is of no evidentiary value. You may consider, in connection with all the other facts and circumstances in the case, in fact, if you find it to be a fact, that the Oregon Company sold its cement at the same price as was quoted by other cement makers.

It is not material in the determination of this case whether you believe the prices actually charged for cement were too high or low, provided no agreement or combination existed to fix prices or divide territory in interstate commerce. The policy of the law is not until all the evils possible from an unlawful combination, actually exist, but to prevent their occurrence. The test of the legality of a combination is not so much the present effect upon prices, but it is the effect upon competition. If the effect is unduly to restrain competition, it is immaterial that for the time being the combination may have exercised its power benevolently. In other words, the statute has no concern with prices, as such, but with combinations in restraint of competition. The law does not compel competition. It may and does, however, attempt to remove illegal barriers resulting [406] from illegal combinations which make competition impractical or impossible.

Now the second count of the indictment, as I have already said to you, charges the defendants with monopolizing the trade or commerce between the states, in violation of Section two of the Act, which provides that all persons who shall monopolize or attempt to monopolize, or combine with any person or persons to monopolize any part of the trade or commerce among the several states, shall be guilty of a crime. To constitute the offense of monopoly, under the Act, it is necessary to acquire exclusive right to such commerce by means which will prevent others from engaging therein. The popular meaning of monopoly is the sole power of dealing in some particular commodity, in some particular market or place, or carrying on some particular business. Anything less than this is not a monopoly. The size of a business is not in itself a violation of this law. The act denounced by the statute is the certain and necessary prevention of other persons engaging in such business and thereby stifling or preventing competition. The evil against which the statute is directed is not the enlargement of the trade of one person, but the destruction of the trade of others, in some commodity. It is the suppression of competition by the unification of interest or management, or by agreement or concerted action. It signifies the combining or bringing together into the hands of one person, or group of persons, the control, or the power of control over a particular business or employment, so that competition may be suppressed by preventing others from engaging therein.

Now, gentlemen, you are the sole judges of all questions of fact in this case. If there is a conflict in [407] the testimony it is your duty to reconcile it if you can, but if you are unable to do so, then you are at liberty to disregard such parts as you may believe unworthy of belief, and credit that which you believe comports with reason and common sense, and your own experience in the common affairs of every day life.

Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which a witness testifies, by his appearance on the witness-stand, by contradicted testimony, or by his interest in the result of the prosecution. You have an opportunity of seeing the witness and observing their manner of testifying, and are advised of any interest or bias they may have shown as to any of the transactions about which they have testified. These are matters for your consideration in weighing the evidence, and which will aid in arriving at a fair and just consideration of all the evidence. You should consider, in weighing the testimony of the witness, the interest, if any, he may have shown, in the result of the trial.

There have been introduced in evidence some letters passed between Mr. Butchart and Mr. Aman Moore at a time prior to the date the Oregon corporation began marketing its products, and prior to the time that Clark Moore became connected with the concern. Any statements contained in such letters or correspondence are not evidence for or against



Clark Moore, unless you should find that such letters show a combination, conspiracy or agreement, as charged in the indictment, and that after Clark Moore became sales manager, of the Oregon Company on April 14, 1916, he aided, abetted or assisted in carrying out and performing the agreement so made. They are, however, evidence against Mr. Butchart, and may be considered [408] by you for the purpose of showing the conditions as they exist at the time Clark Moore became Sales Manager for the Oregon Company.

You will recall that there was also admitted in evidence a letter addressed by certain dealers in Aberdeen, in the state of Washington, to one of the Government departments, and you will also recall that at the time the letter was offered in evidence the Court called your attention to the fact that it was not competent testimony of any of the facts stated therein, but only that a complaint had been made, and for that purpose it was admitted, but should not be considered by you for any other purpose.

There has also been some testimony to the effect that charges of illegal combination were made to the directors of the Oregon Company in June, 1916, and perhaps later. These charges culminated, as you will recall, in certain suits or actions brought by Aman Moore against certain officers or directors of the Oregon Company, and also resulted in the appointment of a stockholders committee, to investigate these charges. The opinion of this committee, or of any director, as to the truth of the

charges, is quite immaterial, and should be disregarded by you. The fact that such charges were made, however, may be considered by you in connection with the manner of conducting the business of the company, and you may compare what was done before and after the charges were made and these suits filed, if there was any change in the manner of doing business, in passing upon the guilt or innocence of the defendants; and it is for you to determine whether sales, if any, made in Washington, after the making of these charges, were designed or intended for the purpose of evading such charges. [409]

Now the defendants Moore and Butchart have each testified in this case. You should apply to their testimony the same rule that you apply to that of any other witness, and give them such faith and credit as you think their testimony is entitled to, keeping in mind, as you should, in weighing their evidence, the interests they naturally have in the result of this case. Mr. Butchart, however, while upon the stand, testified that he did not make certain statements attributed to him by Aman Moore, but said nothing about the letters written by him to Aman Moore; nor did he say anything about the meeting in San Francisco, referred to in these letters, nor offer any explanation of the letters, or any other statements contained therein. Now this was his privilege, and being a defendant he could not be required to say more if he did not desire to do so, nor could he be cross-examined as to matters not covered by the direct testimony, but upon pass-

ing upon the evidence in this case for the purpose of finding the facts, you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness-stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted, in that case, to comment unfavorably upon the defendant's silence. But where a defendant elects to come upon the witness-stand and testify, he then subjects himself to the same rulings that apply to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the circumstances, in reaching their conclusion [410] as to his guilt or innocence, since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence, if there is any against him, he would have done so.

I have permitted the Government to introduce evidence tending to show that in 1915 the Spokane, Portland and Seattle Railway Company promised to reduce its freight charges upon Portland cement, from some point in Washington, to Portland and Vancouver, and that the Western Washington cement manufacturers, and perhaps some of the northern California concerns, combined to defeat such proposed change in freight rates, and that they succeeded in doing so by promising to supply cement

from their mills, for the Interstate Bridge, at the price for which cement for this purpose was offered by the Irwin plant, if the rate had been installed. Such action on the part of the Washington and California manufacturers if proved to your satisfaction, would not of itself constitute a violation of the statute on which this indictment is based, but it would by evidence tending to support the charge of an illegal or unlawful combination. It is entirely lawful for anyone to do what he can to prevent a transportation company from putting in a freight rate which he may deem unjust or discriminatory, and which he may think will injuriously and unduly affect his business. Any number of persons who may be similarly situated may join in opposing the institution of such a freight rate. It is admitted that the Western Washington cement manufacturers and some of the California concerns, combined, in 1915, to defeat a proposed change or reduction in freight on cement from Spokane or Irwin, in Washington, to Portland or Vancouver, but this action on their part was not in itself unlawful or illegitimate and [411] did not constitute a violation of the Statute; but you have a right to consider their acts and conduct in that matter, and not only a right, but it is your duty to consider their acts and conduct in reference to this matter, as bearing upon the question as to whether they indicate or tend to support the charge of an unlawful or illegal combination.

Certain letters have also been introduced in evidence, written by Aman Moore and addressed to



Mr. Butchart, which contain statements or suggestions concerning fixing prices or allotment of territory, by agreement with other manufacturers. The statements or suggestions contained in these letters are not evidence against Mr. Butchart, and do not tend to prove the connection of Butchart with any such agreement or combination, unless it appears that he acquiesced in the suggestion, or acted thereon, or combined with other manufacturers in accordance with the statements or suggestions so made by Moore.

Various letters have also been introduced written by officials, or associates of officials of cement manufacturers in Washington and California, to defendants Clark Moore and Butchart. Any statements, suggestions or requests contained in any such letters are not to be taken or deemed as evidence of the guilt or innocence of the defendants Moore or Butchart, unless Butchart or Moore acquiesced in such statements and acted thereon, or combined with other cement manufacturers in accordance with the statements or suggestions made or contained in the letters, but these letters are a part of the evidence, showing the relation existing between these people, and their conduct and actions, and for that purpose are competent and should be given such weight as you gentlemen may think they are entitled to. [412]

Now, in your consideration of this case, and arriving at your verdict, you will not, I am sure, lose sight of the main fact that the specific offenses with which the defendants are charged, are: first, a com-

bination to restrain interstate commerce; and second, to monopolize such trade or commerce. All that is proven or shown by the evidence as to the means of effecting such combination or monopoly, may be proved as alleged, yet if you are not satisfied beyond a reasonable doubt, that such things tended to restrain interstate commerce or create a monopoly in such, and further, that such things were the result of some previous, tacit or express understanding or agreement between two or more of the parties charged, you should not convict. If on the other hand you believe, from all the evidence, that the things charged in the indictment and shown by the testimony as the means adopted to effect the restraint of trade, or create a monopoly, were done or participated in by the defendants on trial, and that such means naturally or necessarily tend to restrain interstate commerce or stifle competition therein, or did create a monopoly therein, and further, that such means adopted were the result of a previous agreement or tacit understanding between the parties charged, and the defendants on trial were or became parties to such combination, such one of the parties on trial as you may believe to have been so concerned in such agreement or understanding, you should find guilty. If, however, you have a reasonable doubt on any essential issue, you should give the defendants the benefit of it, and acquit.

You may under this indictment find both defendants guilty, or either one guilty and the other not

guilty, on one or both counts, or you may find them both not guilty. [413]

Before the case was presented to the jury the defendants R. P. Butchart and Clark M. Moore presented to the Court in writing certain instructions and requested that the same be given to the jury. These requested instructions are as follows:

I.

Portland cement is a mineral product. Certain earths or minerals, principally lime and clay, are mixed in specific proportions, fused by intense heat into a new uniform composition known as klinker and this klinker ground to an impalpable powder with certain ingredients added, is the Portland cement of commerce. It is sold by barrels, for in the earlier stages of the industry the containers were always wooden barrels. The net content of such barrel was 376 pounds of cement. In the later development of the industry the practice obtained and now rules upon the Pacific Coast of packing the cement in sacks, each sack weighing 94 pounds. Thus, four of these sacks equal one barrel by the sales are still in terms of barrels, and mill capacity is spoken of in terms of barrels. When of a given mill it is said that it has a capacity of 1,000 barrels, it means that working to capacity that mill can output 1,000 barrels a day. In the sales of cement on the Pacific Coast provision is usually made to compensate the ultimate purchaser for a return of sacks in good condition. In this regard the usual allowance is from 7½ to 10 cents per sack.

To the successful manufacturer of cement a factory requires its limestone quarry and its clay deposit; the other ingredients, such as gypsum, etc., usually being purchased abroad. The rough materials brought to the mill are subjected to a drying heat, to grinding to a given degree of [414] fineness, to admixture in due proportions, and then to an intense heat in kilns. The product of this is known as klinker. The klinker marks the termination of the first stage in the production of cement. It may be heaped in piles and exposed to the air and improves, rather than deteriorates by this from the beneficial chemical changes which result from the action of the oxygen in eliminating the free lime which the klinker may contain. In the second process of manufacture the klinker is ground to an extreme fineness, thoroughly mixed with the minor ingredients and transported to the warehouse or packing-house as the completed product ready for the market. The principal ingredients being furnished by the earth in a state of nature the cost of these in their primitive state is not as a rule, great. That cost is principally composed of the investment in mill machinery, and of labor. The mill machinery is complicated and expensive. Dryers, grinders, kilns, conveyors, etc. Much heat being necessary, the fuel item is an extremely heavy one. Owing to the nature of the process by which cement is made and the necessary application of intense heat, the kilns and other machinery are subject to rapid deterioration in use. The life of a cement mill in operation is ten years, or, in other words, the neces-



sary renewals and replacements have in ten years substituted a completely new set of machinery for the original.

## II.

Portland cement is an article of commerce and under the law must be tested before it is placed upon the market and any brand of Portland cement which stands these tests and fulfills the requirements of the law can be used in all work in which Portland cement is used. [415]

## III.

Every manufacturer has the right to ascertain in any legitimate way the price at which goods manufactured by others and competing with the products of his mill are sold. Competing manufacturers issuing price lists from time to time may legally exchange their respective price lists. Competing manufacturers may lawfully advise one another of the territory in which their manufactured products are marketed and may lawfully advise one another of the prices at which their respective products are put upon the market. Giving and receiving such information is not forbidden by law.

## IV.

It is therefore a natural conclusion that the mere fact that a manufacturer of Portland cement in the State of California, Oregon and Washington may have issued from time to time price lists or circulars stating the price at which and terms on which the product of his factory would be sold and that a similar price list or circular letter may have been issued by some or by all other manufacturers of

Portland Cement in said states and that in all of said price lists or circular letters issued at or about the same time the price of Portland Cement is the same and the terms of sale the same, will not in itself constitute a violation of the Statute or be in contravention of the law nor can you find the defendants guilty upon evidence of this character alone even though you should find that every manufacturer sold his product at the same price and upon the same terms. To constitute a violation of the law there must also be evidence which satisfies your minds beyond a reasonable doubt that such prices or terms were fixed by agreement or combination between the several [416] manufacturers and that defendants Butchart and Moore were parties to such agreement or combination.

#### V.

Every manufacturer of Portland Cement has the legal right to determine from time to time the territory in which the parties to whom, the prices at which and the manner in which the product of his factory shall be sold. He may also issue price lists or circulars and employ any other method which he may desire to advertise or sell the product of his mill. Such conduct is not a violation of the statute under which the defendants are indicted or in contravention of any law.

#### VI.

Every commodity such as Portland Cement is under normal business conditions put upon the market for sale and sold and the average price at which such commodity is sold is commonly desig-

nated as the market or market price. Under normal conditions Portland Cement is sold in this manner and the price at which it is so sold from time to time would constitute the market price at the time. Such market price naturally changes from time to time due to cost of manufacture, cost of transportation, supply and demand and to other causes too numerous to enumerate. Each sale affects and therefore each manufacturer in offering and selling his factory's output necessarily contributes to making the market price and of course such action on his part is not in violation of law. It is only the making or fixing of the market price by agreement, combination or conspiracy with other manufacturers which is prohibited so that if you are not satisfied by the evidence beyond a reasonable doubt that either of the defendants, Butchart and Moore, as officers or agents of Oregon Portland [417] Cement Co. did agree or combine or conspire with other manufacturers of Portland Cement in the states above mentioned to make or fix the market price for Portland Cement or agree or combine or conspire with other manufacturers to limit the territory in which Oregon Portland Cement Co. should sell its product or agree or combine or conspire with other manufacturers to limit the territory or fix the price at which the products of the mill of some other manufacturers should be sold you must return a verdict of not guilty.

## VII.

I have permitted the Government to introduce evidence tending to show that in 1915 the Spokane,

Portland & Seattle Railway Company promised to reduce its freight charges upon Portland Cement from Irwin, Washington, to Portland, Oregon and Vancouver, Washington, and that the Western Washington Cement Manufacturers and some of the Northern California Cement Manufacturers combined to defeat such proposed change in the freight rate and that they succeeded in defeating the same by promising to supply cement from their mills for the Interstate Bridge at the price at which cement for this purpose was offered by the Irwin plant if the rate had been installed. Such action on the part of the Western Washington and California manufacturers if proven to your satisfaction would not constitute a violation of the statute on which this indictment is based.

### VIII.

U. S. vs. E. I. Du Pont De Nemours & Co. Fed.  
Rep. Vol. 188, p. 150.

“There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the anti-trust act was passed, a definite legal signification. Not every combination in restraint of competition [418] is in restraint of trade. But it does not necessarily follow that restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish



interstate trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain "trade or commerce among the several states." To what extent the anti-trust act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated, and it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

The language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. Restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade.

### IX.

Even if you are satisfied from the evidence that there was an agreement or combination or a concert of action among the manufacturers of Portland Cement in the states above mentioned to define the territory in which or the prices at which the product of the several factories or mills should be sold yet such agreement, conspiracy or combination is not necessarily within the prohibition of the [419] statute, for to constitute a violation of the statute you must also be satisfied from the evidence beyond a reasonable doubt that said manufacturers thereby intended to restrain interstate commerce

in cement in the market for Portland cement to an unreasonable degree or that interstate commerce in cement was thereby restrained to an unreasonable extent.

## X.

It is entirely lawful for any to do what he can to prevent a transportation company from putting in a freight rate which he may deem unjust and discriminatory, and which he may think will injuriously and unjustly affect his business. Any number of persons who may be similarly situated may join in opposing the installation of such freight rate. It is in evidence that the Western Washington Cement Manufacturers and some of the Northern California Cement Manufacturers combined in 1915 to defeat a proposed change or reduction in the freight rate on cement from Irwin, Washington, to Portland, Oregon, and Vancouver, Washington, but this action on their part was legitimate and lawful, and does not constitute any violation of the Sherman Act.

## XI.

Manufacturers of Portland cement may lawfully ascertain the markets or territories in which and the price or prices at which other manufacturers of Portland cement sell or market their products and having this information or knowledge may use the same in marketing their own products so long as they do not agree or combine or conspire with such other manufacturers but act independently of them. It is only actions taken by agreement or combina-

tion or conspiracy with other manufacturers which the law prohibits. [420]

## XII.

The indictment charges that an agreement, combination, or conspiracy was entered into between certain parties representing certain manufacturers of Portland cement in the states of California, Oregon, and Washington to control or limit the territory in which the output of the several factories should be marketed and to fix the prices at which it should be sold and that defendants Butchart and Moore as the officers and agents of Oregon Portland Cement Company were parties to or became parties to such agreement, combination, or conspiracy and that such agreement, conspiracy, or combination, was entered into for the purpose of restraining interstate commerce in Portland cement in said states and that such interstate commerce was thereby actually restrained. Before you can find either of the defendants Butchart or Moore guilty you must therefore find or be satisfied by the evidence beyond a reasonable doubt, first, that such agreement, conspiracy, or combination was entered into by the defendants named in the indictment or some of them; second, that such agreement, conspiracy, or combination was entered into for the purpose of restraining interstate commerce in Portland cement in said states; third, that it did restrain or restrict such commerce; fourth, that the defendant or defendants Butchart and Moore were parties to or became parties to such an agree-

ment, conspiracy, or combination; fifth, that the defendant or defendants Butchart and Moore were parties to or became parties to said agreement, conspiracy, or combination as officers or agents of Oregon Portland Cement Company; and sixth, that Interstate Commerce in said states in Portland cement would necessarily be restrained or was actually restrained by said alleged agreement, conspiracy, or combination to an unreasonable extent or degree. If you [421] find that one of the defendants Butchart or Moore was not a party to such an agreement, combination, or conspiracy you must find him not guilty, and if you find that neither of the defendants Butchart or Clark Moore was a party hereto you must return a verdict of not guilty in favor of each of said defendants.

### XIII.

There is no evidence in this case which tends to show that either R. P. Butchart or Clark M. Moore monopolized or attempted to monopolize the trade or commerce in Portland cement among the states or combined with any person or persons to monopolize any part of the trade or commerce in Portland cement among the several states. You will therefore return a verdict in their favor in the second count of the indictment.

### XV.

The evidence before you is not sufficient to establish the guilt of the defendant R. P. Butchart and you are hereby directed to return a verdict in his favor of not guilty.



XV.

The evidence before you is not sufficient to establish the guilt of the defendant Clark M. Moore and you are hereby directed to return a verdict in his favor of not guilty.

XVI.

Certain letters have been introduced, written by Aman Moore and addressed to R. P. Butchart, which contain statements or suggestions concerning the fixing of price, the allotment of territory, or agreements with other manufacturers. I instruct you that statements or suggestions made by Aman Moore recited or contained in such letters are [422] not evidence against said Butchart and do not tend to prove the connection of said Butchart with any such agreements or combinations, unless it be further shown independent of such statements or suggestions so made by said Aman Moore and contained in said letters, that said Butchart acquiesced in said statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions so made by said Aman Moore and contained in said letters.

XVII.

Letters have been admitted in evidence written by Aman Moore to R. P. Butchart and by R. P. Butchart to Aman Moore, dated prior to April 14, 1916, the date upon which Clark Moore was selected or appointed Sales Manager for the Oregon Portland Cement Company. Any statements contained in such letters or correspondence are not evidence for or against Clark

Moore, unless you should find that such letters show a combination, conspiracy, or agreement as charged in the indictment, and that after Clark Moore became sales manager of the Oregon Portland Cement Company on April 14, 1916, he acted in furtherance of such combination or conspiracy and aided, abetted, or assisted in carrying out and performing the agreements so made.

### XVIII.

Various letters have been introduced written by officials or associates of officials from cement manufacturers in Washington and California to defendants Clark Moore and R. P. Butchart. I instruct that any statements, suggestions, or requests contained in such letters are not to be taken or deemed as evidence of the guilt or innocence of defendants R. P. Butchart and Clark Moore, unless it be further shown by evidence independent of the statements contained in such [423] letters that defendants Butchart or Clark Moore acquiesced in such statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions so made or contained in said letters."

Upon the trial of this cause and while the witness Tyler Henshaw was upon the stand, the United States had said witness identify a letter written by him to R. P. Butchart dated September 24, 1914, and the same was offered and received in evidence and marked Exhibit 29. To the introduction of this letter the defendants and each of them objected as follows:

“Mr. MINOR.—To this letter I object, not only on account of its date, but also to the substance of it. It has nothing in the world to do as to the cement business. It is regarding a prospect they had down there of manufacturing cement cheaply. I don’t see how it can have any bearing of any kind in this case.”

The objection was overruled and an exception was taken and allowed.

The letter referred to is attached to the Bill of Exceptions marked exhibit No. 29.

While the witness Tyler Henshaw was upon the stand, the United States identified by said witness a letter written by C. W. Jones, local agent for the Riverside Portland Cement Company in Portland, Oregon, to the witness, dated March 9, 1915. This letter was offered and received in evidence and marked exhibit 33 and read to the jury. The defendants and each of them objected to the introduction of this letter as follows:

“Mr. MINOR.—I object to that on account of the date and because it is incompetent. It relates to this Interstate Bridge matter.”

The Court overruled this objection and admitted the [424] letter and to this ruling the defendants and each of them excepted and the exception was allowed.

This letter will be found attached to the bill of exceptions marked exhibit No. 33.

While the witness Tyler Henshaw was upon the stand the United States identified a telegram from William P. Johnson to the witness, dated June 5,

1915, and a letter from the witness to said Johnson, which were offered together as one exhibit, marked exhibit 34, and received in evidence and read to the jury. The defendants and each of them objected as follows:

“Mr. MINOR.—I object to it on account of the date.”

But the Court overruled the objection and admitted the evidence, and to this ruling the defendants and each of them excepted and the exception was allowed. The telegram and letter are found attached to the bill of exceptions marked exhibit 34.

While the witness Tyler Henshaw was upon the stand, the United States identified a letter from the Bend Company to the Riverside Portland Cement Company, dated August 20, 1915, marked exhibit 36.

The defendants objected as follows:

“Mr. MINOR.—I object as incompetent, both on account of the date and on account of the subject matter.”

This objection was overruled and the letter admitted in evidence and read to the jury. To this ruling an exception was taken by the defendants and each of them, and the exception was allowed. This letter will be found attached to the bill of exceptions marked exhibit 36.

The United States produced as a witness C. F. Swigert for the purpose of showing that in February and March, 1915, [425] he obtained a contract to build the substructure of the interstate bridge between the city of Portland and the city



of Vancouver, Washington, and that he made an agreement with the International Cement Company, whose plant was located at Irwin, near Spokane, in Eastern Washington, to furnish the cement for this bridge and for other work at a reduced price, provided that a freight rate of 13½ cents a hundred instead of the prevailing rate of 25 cents a hundred would be put in by the Spokane, Portland & Seattle Railway from Irwin, where this plant is located, to Portland, Oregon, and Vancouver, Washington. All of this evidence was objected to by the defendants and each of them as follows:

“Mr. MINOR.—I wish to object at this time to any questions regarding that matter as being incompetent, immaterial, and irrelevant, being prior to the time we entered the market and not bearing at all upon any question of our being parties to this conspiracy.”

This objection taken by the defendants and by each of them to this evidence was overruled by the Court and to this ruling the defendants and each of them excepted and an exception was allowed.

While the witness C. F. Swigert was upon the stand the United States also identified and offered in evidence a contract between the Superior Portland Cement Company, one of the western Washington companies, whose officers are indicted, and the Pacific Bridge Company, the corporation operated by this witness, under which contract the cement for this interstate bridge was supplied. This paper was marked exhibit 38. The defendants and each of them objected to this exhibit as follows:

“Mr. MINOR.—As far as proving the contract, your [426] Honor, I waive any proving the letter or contract. Of course, I object upon the ground it doesn’t tend to establish any issue in this case, or tend to show any guilt on our part or any conspiracy.”

The Court overruled this objection and admitted this paper and the same was read to the jury marked Exhibit 38 and is attached to the bill of exceptions, and to this ruling the defendants and each of them excepted and the exception was allowed.

While the witness F. M. Wylie was upon the stand the United States identified by this witness a carbon copy of a letter dated February 2, 1915, signed by certain dealers in building materials at Aberdeen, Washington, and addressed to the Treasury Department of the United States. This letter was received in evidence and marked exhibit 40. This letter is attached to the bill of exceptions marked exhibit 34.

Defendants and each of them object as follows:

“Mr. MINOR.—This letter is a letter addressed to the Treasury Department; it is not evidence of any fact; it is clearly incompetent for any purpose. Merely a communication addressed to the Treasury Department by some party unsworn to and the facts, if they were facts, such as the letter details, are facts which must be introduced by sworn testimony and can’t be introduced by a letter of this character.

“Mr. HUMPHREYS.—This letter is not offered, if the Court please, as evidence of the facts

stated in the letter, but is material for this purpose. One of the charges made by the defense here is that this prosecution was instigated by Aman Moore; that Aman Moore was responsible for it, even to the extent at one time of offering to dismiss it. Now, this [427] letter shows where this prosecution originated and it is for the purpose of showing original complaint to the Government, and to overcome their contention about Aman Moore being responsible for it, that this letter is introduced and not as evidence of any facts therein stated."

The Court overruled defendants' objection, to which ruling the defendants and each of them excepted and the exception was allowed, and the letter was read to the jury, whereupon the Court stated: "The jury will understand that this letter is introduced simply for the purpose of showing that complaint was made on this date and is not evidence to be considered by you as evidence of any facts stated in it."

While the witness J. T. Bennett was on the stand, said witness testified that the California companies discontinued selling cement at Vancouver during 1914 and that at the beginning of 1915 the price of cement at Vancouver had been established at \$1.90 a barrel to consumers; that at about this time a Mr. Lille, salesman for the Superior Portland Cement Company, one of the Western Washington cement companies, whose officers are indicted, visited the witness and talked to the witness about the cement business, and thereupon the United States propounded to said witness the following question:

“Q. What did he say to you about it?” The defendants and each of them objected to this question and to any evidence in regard to what Mr. Lille said upon the ground that the evidence would be incompetent as Mr. Lille was merely a salesman and what he should say in selling cement would not be evidence against any of the parties indicted unless it were shown that he had authority to make the statements or representations that he made. This objection was overruled by the Court, and the defendants and each of them excepted to the ruling and the exception was allowed and the [428] statement made by Mr. Lille to the witness was admitted in evidence.

Thereupon the witness testified:

“Well, it has been a long time ago, but I remember that he—I don’t remember his exact words, but he gave me to understand that there was a meeting in San Francisco of the cement manufacturers of the coast, including the Washington and the California, and that there was no doubt at all but what there would be an adjustment of prices and that they would be much higher, and no deviation from the set prices, and advised me to buy all the cement that I thought I could handle.

“Q. Did you take any action on that advice?

“A. I did.

“Q. What action?     A. Bought cement.

“Q. How much?

“A. I couldn’t tell you at this time, several car-loads.



“Q. And what happened after you placed that order, with respect to the prices of cement?

“A. In a very short time, I should say two or three days, we had a wire that the price would be \$1.90 with the usual dealers’ commission.

“Q. Was that a raise or a decrease?

“A. That was a raise; I think our prices were around \$1.55 before that.”

While this witness Bennett was upon the stand, the United States identified by this witness a letter from the witness to the Superior Portland Cement Company and the answer of the Superior Portland Cement Company endorsed on the back of it, and offered said letter and the answer in evidence.

[429] This letter and the answer are attached to the bill of exceptions marked exhibit 44. The defendants and each of them objected to the introduction of this letter and the answer as follows:

“Mr. MINOR.—I do not think competent for any purpose.”

The Court overruled the objection and the letter and answer were introduced into evidence and read to the jury, and to this ruling the defendants and each of them excepted and the exception was allowed.

While this witness Bennett was upon the stand, the United States identified a letter dated August 9, 1916, written by him to the Superior Portland Cement Company at Seattle and the answer thereto, which are marked Exhibit 45 and offered the same in evidence.

The defendants and each of them objected to the introduction of this correspondence as follows:

“Mr. MINOR.—I object as incompetent and irrelevant for any purpose.”

The Court overruled the objection and admitted the evidence, and to this ruling the defendants and each of them excepted and the exception was allowed.

The said exhibit is attached to the bill of exceptions.

While the witness Fred W. Farrington was upon the stand the United States identified a letter written by Fred R. Muhs to F. T. Crowe & Company at Portland, dated April 25, 1914, marked exhibit 46 and attached to the bill of exceptions.

To the introduction of this letter the defendants and each of them objected as follows:

“Mr. MINOR.—I don’t believe this letter is competent or relevant, as it doesn’t undertake to establish any issue [430] in the case.”

The Court overruled the objection and admitted the letter in evidence, and to this ruling the defendants and each of them excepted and the exception was allowed.

While said witness Farrington was upon the stand, the United States identified a letter dated July 9, 1914, written by Fred R. Muhs to F. T. Crowe & Company, of Portland, marked exhibit 47, and attached to the bill of exceptions.

To the introduction of this letter the defendants and each of them objected as follows:

“Mr. MINOR.—I don’t believe this letter is competent or relevant, as it doesn’t undertake to establish any issue in the case.”

But the Court overruled the objection and ad-

mitted the letter and to this ruling the defendants and each of them excepted and the exception was allowed. [431]

The United States offered in evidence transcript of the testimony of W. E. Hacker, taken upon the former trial of this case and particularly the exhibits offered upon the former trial with the testimony of said Hacker, marked exhibits 49 to 58 inclusive. Of these exhibits, 49, 51, 53, 54, 56, 57, and 58 were letters passing between the western Washington cement manufacturers and F. T. Cowe & Company at Tacoma, and related entirely to intrastate business. The defendants and each of them objected to the introduction of each of the exhibits 49, 51, 53, 54, 56, 57, and 58 upon the ground that the same were incompetent and irrelevant as the same did not relate at all to interstate business nor show any combination, agreement, or conspiracy between any cement manufacturers which affected interstate business, but the Court overruled the objection and admitted the said letters in evidence and to this ruling and the admission of each of these letters the defendants and each of them excepted and the exception was allowed, and the said letters were introduced in evidence and are attached to the bill of exceptions.

While the witness Cecil H. Bacon was upon the stand, the United States identified certain letters received by Galbreath, Bacon & Company written by the western Washington cement manufacturers, marked exhibits 61, 62, and 63, which letters are attached to the bill of exceptions. To the introduc-

tion of each of these letters the defendants and each of them objected upon the ground that the same related entirely to intrastate business, to matters between the western Washington companies and dealers in the state of Washington and did not relate at all to interstate business, and that they were incompetent and irrelevant for this reason, but the Court overruled [432] the objection and admitted said letters and each of them, and to this ruling and to the admission of each of said letters the defendants and each of them excepted, and the exception was allowed.

While the witness John C. Eden was on the stand, the United States identified a file containing certain letters and telegrams pertaining to the interstate bridge cement contract and to his activities in defeating the proposed freight rate from Irwin to Portland and Vancouver. These letters and telegrams were marked exhibits 74 and 75 and are attached to the bill of exceptions. To the introduction of these papers and to each of them the defendants and each of them objected upon the ground that the same did not tend to show any agreement, combination, or conspiracy between cement manufacturers relating to interstate commerce, but only related to the activities of the witness in opposing what was regarded as a discriminatory freight rate upon cement from Irwin to Portland and Vancouver, but the Court overruled the objection and added these papers and to this ruling the defendants and each of them excepted and excepted to



the admission of each of said papers, and the exception was allowed.

While the said witness Eden was upon the stand the United States identified certain papers marked exhibit 76 and attached to the bill of exceptions, and offered the same in evidence. To these papers and each of them the defendants and each of them objected upon the ground that the papers had entirely to do with promotion work and were entirely irrelevant, but the Court overruled the objection and admitted these papers in evidence, and to this ruling the defendants and each of them excepted and excepted to the introduction of each of said papers, and the exception was allowed.

[433]

While the witness Eden was upon the stand certain papers were identified by the witness as literature prepared for distribution and distributed by the Portland Cement Association, a National Association of cement manufacturers throughout the United States organized to promote the uses and extend the market for cement, and these papers the defendants offered in evidence, but the United States objected to the introduction of these papers and to the introduction of any of them as immaterial and incompetent, and the Court sustained the objection and would not allow any of the papers to be introduced in evidence and to this ruling the defendants and each of them excepted and the exception was allowed.

While the witness W. P. Cameron was upon the stand, the United States identified a letter dated August 4, 1916, marked exhibit 78, and certain other papers marked exhibit 79 which are attached to the bill of exceptions, and offered the same in evidence.

Defendants objected to these letters as follows:

“Mr. MINOR.—It relates only to intra-state business. The only question is between the Washington companies themselves no mention of any other companies.”

Which objection was overruled and the letters were admitted, and to this ruling the defendants and each of them excepted and the exception was allowed.

While the witness Aman Moore was upon the stand, the United States identified a carbon copy of a letter written by the witness to R. P. Butchart, dated December 31, 1915. This letter contains certain suggestions made by the witness Aman Moore to R. P. Butchart in regard to the manner of conducting the business of the Oregon Portland Cement Company [434] and suggestions that he, Butchart, should bring about some arrangement with the Washington and California cement manufacturers through his acquaintance and friendship whereby the market for the Oregon Portland Cement Company's product might be established without cutting prices. This letter was objected to by the defendants and by each of them upon the ground that it was incompetent and irrelevant, but the Court overruled the objection and admitted

the letter, and to this ruling the defendants and each of them excepted and the exception was allowed, and the said letter is attached to the bill of exceptions marked exhibit 89.

While the witness Aman Moore was upon the stand, he testified that Mr. C. Boettcher and R. J. Morse came to Portland to settle the controversy between himself and Mr. Butchart and other directors, and particularly to take some action to prevent Oregon Portland Cement Company from participating in the alleged illegal combination in restraint of interstate commerce; that Mr. Boettcher agreed that Clark M. Moore should be replaced as sales manager and that while Mr. Butchart might remain as president, the witness Aman Moore would be in a position where he could not only manage the plant but manage the sales and see that nothing illegal was done; that this matter came up about a week after Mr. Boettcher returned at a meeting in Mr. Minor's office with Clark M. Moore representing Mr. Boettcher and Mr. H. A. Ross representing Mr. Butchart, and that he was then informed that an entirely different program had been arranged, one not at all in accordance with the one made by him with Mr. Boettcher and Mr. Morse; that the agreement between himself and Mr. Boettcher and Mr. Morse was that Clark M. Moore should remain [435] as sales manager temporarily and Mr. Butchart as president temporarily, whereas at the meeting in Mr. Minor's office the only change to be made was that Mr. Newlands should resign and the witness Aman Moore act as

superintendent of the mill and that Mr. Minor was to carry out this arrangement. To meet this evidence the defendants identified a letter written by Mr. Minor to Aman Moore, dated July 25, 1916, a copy of which is set forth in the transcript of evidence contained in the bill of exceptions, and offered this letter in evidence. The United States objected to the introduction of this letter upon the ground that the same was immaterial, and the Court sustained the objection and excluded the letter, and to this ruling the defendants and each of them excepted and the exception was allowed.

While the witness Aman Moore was upon the stand he testified that he had given Mr. Minor evidence of facts tending to show the charge made by him, that Mr. Butchart and Mr. Clark M. Moore had entered into a combination in restraint of interstate commerce. To meet this evidence the defendants by this witness identified a letter written by Wirt Minor to the witness, dated August 29, 1916, a copy of which is set forth in the transcript of the evidence contained in this bill of exceptions. To this letter the United States objected upon the ground that the same was immaterial, and the Court sustained the objection and refused to allow the letter to be introduced in evidence, and to this ruling the defendants and each of them excepted and the exception was allowed.

At the close of the testimony of Aman Moore the attorneys for the defendants, and particularly for Clark M. Moore, moved the Court to instruct the jury to disregard all [436] correspondence in



evidence between Aman Moore and R. P. Butchart prior to the time that Clark M. Moore was elected sales manager in considering this case with reference to the guilt or innocence of Clark M. Moore and that such correspondence passing between Mr. Butchart and Mr. Aman Moore should not be considered in arriving at a verdict as to the guilt or innocence of said Clark M. Moore. The Court, however, denied the motion, stating, "of course any statements or admissions Mr. Butchart made before Mr. Moore became connected with this company would not be competent as admission of guilt against Clark M. Moore, but would be competent for showing the status of the company and the condition at that time and the admission made against the interests of Mr. Butchart," and to this ruling the defendants and each of them excepted and an exception was allowed.

While W. H. George, a witness on behalf of the United States, was upon the stand, he identified certain correspondence between himself and Carl Leonardt, of the Southwestern Portland Cement Company, marked Exhibit 105, and attached to the bill of exceptions, and this correspondence was offered in evidence by the United States, and to this correspondence the defendants and each of them objected upon the ground that the same was incompetent and correspondence between Carl Leonardt of the Southwestern Portland Cement Company, and the witness, but the Court overruled the objection and admitted the correspondence and thereupon the defendants and each of them ex-

cepted to this ruling and the exception was allowed.

While W. D. Skinner, a witness called on behalf of the United States, was upon the stand, he was interrogated by the United States in regard to putting in a special rate upon cement from Irwin, Washington, to Portland, Oregon, and [437] Vancouver, Washington, and the efforts of the western Washington cement manufacturers and of Mr. Muhs of the Santa Cruz Portland Cement Company to prevent this rate. To this testimony the defendants and each of them objected upon the ground that the same was incompetent, immaterial, and irrelevant being prior to the time Oregon Portland Cement Company entered the market, and not bearing at all upon any question of defendants being parties to this conspiracy, but the Court overruled the objection and allowed this evidence to be introduced and to this ruling the defendants and each of them excepted and an exception was allowed. Among other evidence so offered was a slip of paper, dated March 6, 1915, in the handwriting of the witness, marked exhibit 151, attached to the bill of exceptions and a carbon copy of a letter received from the International Portland Cement Company attached to the bill of exceptions, marked exhibit 152, and two telegrams attached to the bill of exceptions and marked exhibit 153.

Fred R. Muhs, a witness called on behalf of the United States and whose testimony was taken upon the former trial of this cause, but whose testimony was not introduced by the United States upon this

trial but by the defendants, testified in regard to the several cement plants upon the Pacific coast to the date of their beginning operations and the capacity of the plants. He was the manager of the Santa Cruz and Standard plants in Northern California. Upon his cross-examination, the defendants propounded to this witness the following question: "Q. Now, during the time that you were connected with these two mills, I will ask you to tell the jury whether the business was profitable or not?"

"A. Well, the first two years we operated the Santa [438] Cruz and Standard plants I would say that they were not profitable years, in fact, the balance sheet made up for the year 1908 for both companies I believe showed considerable loss. At the end of 1908, the management of the company was changed, the old management retired, and since that time I think the companies have made money.

"Q. Now, give the jury some idea how profitable it has been. Say how much money in proportion to the capital your mills have made.

"Mr. GOLDSTEIN.—If the Court please, I cannot see the materiality of going into detail now as to the amount of profit or amount of loss. I think counsel was given considerable latitude when asking whether they made a profit.

"COURT.—I think you can show whether it was profitable or not, but the details of the amount of it, I think, is not material to show, whether a loss or whether a profit. I think the objection is well taken."

To which ruling of the Court the defendants excepted and the exception was allowed.

In his testimony the witness Muhs testified in regard to the price or prices charged for cement by the mills represented by him from time to time, and that prices were based upon the cost of manufacture, freight and competitive conditions. Thereupon, upon his cross-examination, the attorneys for the defendants propounded the following question:

“Q. What do you say to the jury,—tell the jury whether in your judgment, taking into consideration the cost and manufacture and the freight which you wished to pay upon cement, the price which you then fixed was or was not a reasonable price.

Mr. GOLDSTEIN.—I don't think that is material. [439] I have no objection to Mr. Muhs saying anything he knows about the situation, but I think the conclusion to be drawn is a matter for the jury, and not Mr. Muhs' personal opinion.

COURT.—I think the objection is well taken. He can tell upon what he bases his price because that is a material inquiry in the case.

Mr. MINOR.—Yes, your Honor, I tried to get that, but the witness doesn't seem to follow that. I will except to your Honor's ruling.”

Which exception was allowed.

Mr. C. T. W. Hollister, called as a witness on behalf of the defendants, was interrogated regarding freight rates from the several cement plants on the Pacific Coast into various territory in which the



Oregon Portland Cement Company's product was sold and in regard to the rate from Oswego to Astoria and from Oswego to Portland upon cement, the plant of the Oregon Portland Cement Company being located at Oswego. Thereupon the attorneys for the defendants propounded the following question:

"Q. Do you know the distance from Spokane to Portland?

Mr. HUMPHREYS.—What do you claim for that?

Mr. WINFREE.—I want to use an argument with reference to reasonable rate, and as to why there should be an effort on the part of cement companies to combat a rate of  $13\frac{1}{2}$  cents for a distance of three hundred odd miles as against a rate of 10 cents for a distance of one hundred miles.

Mr. HUMPHREYS.—I don't think the reasonableness of that rate is in question here.

COURT.—I don't see how that could have any bearing [440] one way or another on this case. The S. P. & S. agreed to put in a rate of  $13\frac{1}{2}$  cents; they wanted to get the business; that is the important feature of this case, not whether reasonable or not.

Mr. HUMPHREYS.—Mr. Skinner was not asked anything about that.

Mr. MINOR.—Not to impeach Mr. Skinner at all. As I understand this matter of the Interstate Bridge, I didn't think it competent all the way through. Now, I understand the contention of the Government is that the combination of these mills

to defeat that rate shows or tends to show that they had combined to control prices, or combined to exclude some other mill out of the market. Now, if that were the case, it would seem to me that these mills would be warranted in combining to defeat a rate of that character if the rate didn't work both ways, and if their territory, or the territory which was nearest to them, was subject to a relative higher rate. In other words, certainly it seems to me that parties can, without violating the law, combine to get a rate or defeat a rate, if that rate works adversely to them, without being in contravention of the law. That is the object of the evidence.

COURT.—That isn't the question counsel asked. He wants to compare that rate with the rate to Astoria. He wants to compare for the purpose of showing whether one was reasonable or unreasonable. I think the objection is well taken."

Exception saved.

"Q. Do you know the rates, Mr. Hollister, from the Oswego mill, on the S. P. & S. to Salem, or lines controlled by the S. P. & S., to Albany, Corvallis, and Eugene? [441]

Mr. HUMPHREYS.—Is that for the same purpose?

Mr. WINFREE.—Same purpose.

Mr. HUMPHREYS.—I object on the same ground."

Objection sustained, to which ruling the defendants and each of them excepted, and the exception was allowed.

While L. C. Newlands, a witness for the defendants, was upon the stand, he was interrogated in regard to the cost of manufacture of cement at the plant of the Oregon Portland Cement Company, said witness being superintendent of the plant, and testified regarding the actual cost of manufacture, without taking into consideration depletion of supply of raw material and without taking into consideration the cost of the plant necessary for the manufacture.

Thereupon the witness was asked a question.

“Q. Now, Mr. Newlands what was the reasonable cost of putting up this mill in 1915 or 1916?”

Thereupon the United States Attorney objected and the objection was sustained, and the defendants and each of them excepted to this ruling and the exception was allowed.

Melvin J. Ballard was called as a witness on behalf of the defendants and testified in this cause, and while on the stand testified that he was a director and vice-president of the Oregon Portland Cement Company from the time of its organization until after the indictment was found. That about June 6, 1916, he received a letter from Mr. Butchart asking him to look after the business of the company in his stead, and that he spent much time from that time on in the company's office and frequently visited the plant. He further testified that after Aman Moore had made charges against the manner in which the business of the company was conducted, and particularly that the company was being made a party to a conspiracy or combi-

nation in restraint of interstate commerce, he made an investigation to ascertain whether or not these [442] charges were true, interviewed all the employees, looked into the sales record, interviewed a number of employees of other companies selling cement in Portland and elsewhere, and thereupon the defendants offered to show by this witness what, if anything, he found from his investigation in regard to the truth of the charges made, but the Court refused to allow this evidence to be introduced and to this ruling of the Court the defendants and each of them excepted and the exception was allowed, and thereupon in connection with the testimony of this witness the defendants propounded to this witness the following question: "Q. What did you do, Mr. Ballard, in order to ascertain the prices at which the Oregon Portland Cement Company's products were being sold?" To this question the United States objected as immaterial, and the Court sustained the objection, and the defendants and each of them excepted to this ruling and the exception was allowed. In connection with the testimony of this witness, he testified that he talked with Clark M. Moore in regard to the territory in which the product of the mill should be sold, and thereupon the defendants propounded to this witness the following question: "Q. And what, if anything, did he (Clark Moore) say to you with regard to prices at which the product of the mill should be sold?" To this question the United States objected upon the ground that the declarations were self-serving declarations,



and the Court sustained the objection and refused to allow the question to be answered or any evidence given in regard thereto, and to this ruling the defendants and each of them excepted and offered to show by this witness that Clark Moore said nothing in regard to the prices at which the product of the mill was to be sold, and [443] the exception was allowed.

While the witness H. S. McCracken, called on behalf of the defendants, was upon the stand, upon his cross-examination the United States propounded to said witness the following question: "Q. At what price did you sell cement at that time?" it appearing that this witness was a dealer and purchased cement from the Oregon Portland Cement Company, and prior to the time that the Oregon Portland Cement Company had entered the market had purchased from other cement manufacturers on the Pacific coast. To this question the defendants objected as follows:

"Mr. MINOR.—I think that is immaterial, at what price the dealer sold it."

But the Court overruled the objection and permitted the question to be answered, and to this ruling the defendants and each of them excepted and the exception was allowed.

Wirt Minor was called as a witness on behalf of the defendants and testified that he was a director of the Oregon Portland Cement Company from the time of its organization until after the indictment was found, that he attended all the meetings of the directors and was consulted frequently by the

officers of the company as attorney for the company; that he knew of the visit of Mr. Boettcher to Portland about which Aman Moore had testified and knew that Mr. Boettcher had attempted to make some agreement to settle the differences between Aman Moore and Mr. Butchart, but did not know what the agreement was; that this agreement was subsequently discussed in his presence by Aman Moore, Clark M. Moore and Mr. Harry Ross; that during this discussion a telegram, dated July 27, 1916, addressed to R. P. Butchart was either read or [444] shown to him by Aman Moore, and thereupon the defendants offered in evidence this telegram as a part of the discussion upon this agreement about which Aman Moore had testified, but the United States objected to the introduction of this telegram and the objection was sustained and the telegram was not permitted to be introduced, and to this ruling the defendants and each of them excepted, and the exception was allowed. This telegram is as follows:

“July 27, 1916.

R. P. Butchart,

Vanderbilt Hotel, New York City.

We have inspected your plant here and have no criticisms to make of Mr. Newlands' management, but on account of notoriety of lawsuit and damage to company would recommend Aman Moore be placed in charge of plant and quarries leaving sales as at present and that you wire Mr. Newlands to resign and permit the election of some new members to Board of Directors. We have talked to

number of stockholders here and they are unanimous that settlement should be made with Moore to prevent notoriety and damage of his suit. Bank also refuses to extend loan unless assured suit will not be brought. We have looked over figures in office and find we must have at once fifty thousand dollars more to meet pay rolls and bills. Wilcox will loan part if board is reorganized. If change meets with your approval will you kindly wire Teal and Minor attorneys and stockholders to call meeting and reorganize board and appoint Moore superintendent.

C. BOETTCHER.

R. J. MORSE.

E. POSSETT." [445]

While Clark M. Moore was upon the stand, called as a witness on behalf of the defendants, he testified that he went to San Francisco about the 10th of August, 1916, and in regard to the purpose for which he made this visit to San Francisco, among other things, that he went to San Francisco to interview Grant Fee who had obtained the contract to build the postoffice in the city of Portland, but did not see him but talked with him over the telephone with a view to selling him Oregon Portland cement for this building, and thereupon the defendants offered in evidence telegram from the witness to Grant Fee and a letter from Grant Fee to the witness, marked Defendants' Identifications 112 and 113. To the introduction of these papers the United States objected and the court sustained the objection and did not allow the said papers to

be introduced in evidence, and to this ruling the defendants and each of them excepted and the exception was allowed.

While Clark M. Moore was upon the stand as a witness for the defendants he testified regarding a visit he made to San Francisco in August, 1916, and that among other objects of that visit was to see a Mr. Hiltz who was in charge of the business of the Portland Cement Association on the Pacific coast with a view to having him come to Portland and arrange for an inspector upon some road work that was being done so that the work might be done according to specifications. In connection therewith the defendants offered in evidence certain telegrams relating to this matter, marked Defendants' Identifications 114 and 115, but the United States objected to the introduction of these telegrams and the court sustained the objection and excluded said telegrams, and to this ruling the defendants and each of them excepted and the exception was allowed. [446]

While the witness Clark Moore was on the witness-stand in his own behalf, he testified as follows:

"Q. Now tracing your movements further, Mr. Moore, you left here very soon after you came to Portland in April, 1916, I understand?

"A. Yes, sir.

"Q. Where did you go?      A. I went to Denver.

"Q. And how long did you remain in Denver before you came to the coast again?



“A. I came here about the latter part of May or the first of June; might have been the first of June.

“Q. How did you come that time?

“A. I came by way of San Francisco.

“Q. What were you doing in San Francisco then? Why did you go there?

“A. A personal matter that I had to attend to with a nephew of mine.

“Q. Was he interested in the cement business

“A. No, sir, he is not in the cement business at all; he is in a bank; has nothing whatever to do with the cement business, and a matter that we had up between us. Had nothing whatever to do with the cement business and was purely personal. I went to Los Angeles to see him, which I did, but didn't see anyone else that I knew while I was in Los Angeles; it was—

“Q. Then you came from Los Angeles to San Francisco?

“A. Yes, or went from San Francisco to Los Angeles.

“Q. Went from San Francisco to Los Angeles?

“A. Yes.

“Q. What were you doing in San Francisco?

“A. Well, that is the route to Los Angeles; that is [447] to say, that is one, and that is the way I went.

“Q. I will ask you to state whether or not at that time you met Mr. Butchart in San Francisco?

“A. No, sir, I did not.

“Q. Had you seen him since you had met him in April, 1916?

"A. No, sir, I had not.

"Q. I will ask you to state whether at that time you met any of the manufacturers of cement in California or in Washington in California at that time?

"A. I did. I called at the offices, I think, of possibly the three companies there, the Henry Cowell Company, the Pacific Portland, and the Santa Cruz; merely a social call to pay my respects to them.

"Q. Did you meet any of the officers of the company at that time?

"A. Yes, sir, I met Mr. Cameron and Mr. Muhs of the Santa Cruz Standard Portland Cement Company.

"Q. Did you meet any officers of the Pacific?

"A. Yes, sir, my recollection is that I met Mr. Henderson; that is as I remember it.

"Q. Did you meet Mr. Erlin?

"A. Not that I remember that time. I can't recall it if I did."

Thereafter on cross-examination the defendant Clark M. Moore identified a certain letter written by him to Mr. C. Boettcher, dated May 18, 1916. The entire letter was not produced, but only excerpts from the same. The United States offered in evidence particularly that paragraph thereof reading as follows:

"I am going to Portland, Oregon, via San Francisco, [448] where I will see our friends, and I am very much pleased to have received letters since I saw you, from Mr. Erlin of the Pacific Port-

land Cement Company and Mr. Muhs of the Santa Cruz Company, asking if it would not be possible for me to go to Portland via San Francisco so as to discuss matters of interest."

To the introduction of this evidence the defendants and each of them objected upon the ground that the same was incompetent and irrelevant and thereupon the court asked:

"What I want to know is, whether you object to the form of the document or to the competency of the evidence?"

To which Mr. Minor replied:

"On Mr. Humphrey's assurance that he can prove the document, I will waive that."

And thereupon the Court overruled his objection and the excerpt above quoted was introduced in evidence marked Exhibit No. 163, and read to the jury, and is attached to the bill of exceptions, and to this ruling the defendants and each of them excepted and the exception was allowed.

The defendants and each of them excepted to each and all parts of the charge of the Court relating to the second count in which the court defines what constitutes a monopoly and submits to the jury the question of the guilt or innocence of the defendants Butchart and Moore upon this count. This part of the charge is substantially as follows:

"It (the indictment) contain two counts: the first charges certain parties, managers or representatives of cement manufacturing concerns in the states of Oregon, Washington, and California, with entering into an unlawful combination or agree-

ment in restraint of trade. \* \* \* The second count charges the same parties by means of the same arrangement and combination with monopolizing the trade in cement in these several states.” [449]

Again in the charge, it is said:

“Section 2 of the act provides that every person who shall monopolize any part of the trade or commerce among the several states or with foreign nations, shall be guilty of a misdemeanor.”

Further in the Court the charge says:

“Now the second count of the indictment, as I have already said to you, charges the defendants with monopolizing the trade or commerce between the states, in violation of section 2 of the act, which provides that all persons who shall monopolize or attempt to monopolize or combine with any person or persons to monopolize any part of the trade or commerce among the several states, shall be guilty of a crime. To constitute the offense of monopoly, under the act, it is necessary to acquire exclusive right to such commerce by means which will prevent others from engaging therein. The popular meaning of monopoly is the sole power of dealing in some particular commodity, in some particular market or place, or carrying on some particular business. Anything less than this is not a monopoly. The size of a business is not in itself a violation of this law. The act denounced by the statute is the certain and necessary prevention of other persons engaging in such business and thereby stifling or preventing competition. The



evil against which the statute is directed is not the enlargement of the trade of one person, but the destruction of the trade of others, in some commodity. It is the suppression of competition by the unification of interest or management, or by agreement or by concerted action. It signifies the combining or bringing together into the hands of one person, or group of persons, the control, or the power of control over particular business or employment, so that [450] competition may be suppressed by preventing others from engaging therein."

The defendants and each of them excepted to this charge, and the exception was allowed.

The defendants and each of them excepted to that portion of the charge of the Court regarding the Portland Cement Company prior to the Oregon Portland Cement Company, the predecessor in interest, and the exception was allowed.

The trial court submitted to the jury letters written prior to the organization of the Oregon Portland Cement Company and before Mr. Butchart had anything to do with the management of the Oswego plant. The defendants and each of them excepted to this charge of the jury. This charge is as follows:

"There have been introduced in evidence some letters passing between Mr. Butchart and Mr. Aman Moore at a time prior to the date the Oregon corporation began marketing its product, and prior to the time that Clark Moore became connected with the concern. Any statements con-

tained in such letters or correspondence are not evidence for or against Clark Moore, unless you should find that such letters show a combination, conspiracy, or agreement, as charged in the indictment, and that after Clark Moore became sales manager of the Oregon Company on April 14, 1916, he aided, abetted, or assisted in carrying out and performing the agreements so made. They are, however, evidence against Mr. Butchart, and may be considered by you for the purpose of showing the conditions as they existed at the time Clark Moore became Sales Manager for the Oregon Company.

Certain letters have also been introduced in evidence written by Aman Moore and addressed to Mr. Butchart, which contain statements or suggestions concerning fixing prices or allotment of territory, by agreement with other manufacturers. [451] The statements or suggestions contained in these letters are not evidence against Mr. Butchart, and do not tend to prove the connection of Mr. Butchart with any such agreement or combination, unless it appears that he acquiesced in the suggestion, or acted thereon, or combined with other manufacturers in accordance with the statements or suggestions so made by Moore.

Various letters have also been introduced written by officials, or associates of officials, of cement manufacturers in Washington and California, to defendants Clark Moore and Butchart. Any statements, suggestions, or requests contained in any such letters are not to be taken or deemed as evi-

dence of the guilt or innocence of the defendants Moore or Butchart, unless Butchart or Moore acquiesced in such statements and acted thereon, or combined with other cement manufacturers in accordance with the statements or suggestions made or contained in the letters, but these letters are a part of the evidence, showing the relation existing between these people, and their conduct and actions, and for that purpose are competent and should be given such weight as you gentlemen may think they are entitled to."

The evidence shows that all of these letters passing between Aman Moore and R. P. Butchart were kept by Aman Moore in a private file as not any part of the business of the Oregon Portland Cement Company, and that these letters were never seen by Clark M. Moore or their contents made known to him.

The defendants and each of them excepted to the court's charge regarding charges against the directors and particularly in connection with the fact that the trial court stated in that charge that the jury may be allowed to consider [452] those charges for the purpose of showing whether or not their manner of doing business, after the charges were made, was changed and defendants excepted on the ground that the evidence shows that the charges were made on the very day the business was commenced, June 9th.

This exception was allowed; and the part of the Court's charge thus excepted to is as follows:

“There has also been some testimony to the effect that charges of illegal combination were made to the directors of the Oregon Company in June, 1916, and perhaps later. These charges culminated, as you will recall, in certain suits or actions brought by Aman Moore against certain officers or directors of the Oregon Company, and also resulted in the appointment of a stockholders’ committee, to investigate these charges. The opinion of this committee, or of any director, as to the truth of the charges, is quite immaterial, and should be disregarded by you. The fact that such charges were made, however, may be considered by you in connection with the manner of conducting the business of the company, and you may compare what was done before and after the charges were made and these suits filed, if there was any change in the manner of doing business, in passing upon the guilt or innocence of the defendants; and it is for you to determine whether sales, if any, made in Washington, after the making of these charges, were designed or intended for the purpose of evading such charges.”

The defendants and each of them excepted to that part of the Court’s charges in regard to the failure of Mr. Butchart to testify in regard to letters and meetings in California.

Mr. Minor, noting his exception, said:

“As far as the letters are concerned, I don’t object [453] to that part of it, but as far as the meetings in California, there being no evidence of meetings in California which he attended.”



Thereupon the Court said the charge is confined to the reference in the letters. He refers in these letters to meetings.

Whereupon Mr. Minor said:

“To be held, but not to any meetings which were held. Therefore I object to that part of the charge.”

The portion of the charge to which exception was so noted is as follows:

“Mr. Butchart, however, while upon the stand, testified that he did not make certain statements attributed to him by Aman Moore, but said nothing about the letters written by him to Aman Moore; nor did he say anything about the meeting in San Francisco, referred to in these letters, nor offer any explanation of the letters, or of any other statements contained therein. Now, this was his privilege, and being a defendant he could not be required to say more if he did not desire to do so, nor could he be cross-examined as to matters not covered by the direct testimony, but upon passing upon the evidence in this case for the purpose of finding the facts, you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so, no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence. But where a defendant elects to come upon the witness stand and testify, he then subjects him-

self to the same rulings that apply [454] to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the circumstances, in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence, if there is any against him, he would have done so," and the exception was allowed.

Defendants also excepted to that portion of the charge in regard to letters written by Aman Moore addressed to Mr. Butchart and which contained statements or suggestions concerning fixing prices or allotting territory by agreement with other manufacturers. The trial court instructed the jury that these letters were not evidence against Mr. Butchart unless it appears that he acquiesced in the suggestions or acted thereon or combined with other manufacturers in accordance with the statements or suggestions. The defendants excepted to this part of the charge.

Each of the exceptions to the charge above noted were allowed by the Court.

The defendants submitted in due time and asked that certain instructions be given to the jury. These instructions are numbered I to XVIII.

The defendants and each of them then and there excepted to the refusal of the Court to give the

charges as requested by defendants, which exception was allowed.

R. P. BUTCHART,

By WIRT MINOR,

One of His Attorneys.

CLARK M. MOORE,

By WIRT MINOR,

One of His Attorneys.

TEAL, MINOR & WINFREE,

Attorneys for the Defendants. [455]

#### PLAINTIFF'S EXHIBITS.

Exhibit No. 1. Stipulation signed November 29, 1920, stipulating certain facts to be read to the jury.

Exhibit No. 1. Letter from Jones Tyler Henshaw, dated April 1, 1914, enclosing confirmation of telegram advising new market price in Portland \$1.70 net, says price quoted openly, and apparently on instructions to California representatives from San Francisco, says Olympic and Washington claims they have no instructions to make this price, but would need it if officially informed to do so. Refers to quotations on Meier & Frank job.

Exhibit No. 2. Letter from Jones to Henshaw, dated April 7, 1914, refers to seeing Hacker who stated Seattle price was \$1.60 f. o. b. dock. Says price is apparently result of fight between Washington mills. Says no reduction in Portland, probably for lack of business, says Washington mills made the assertion their Seattle price would apply

to Portland, excepts drop in Portland market. Also letter from Henshaw to Jones, dated San Francisco, April 11, 1914, acknowledges information and refers to fight against Warren Construction Company, offers to contribute \$200.00 per month toward fight."

Exhibit No. 3. Telegram Jones to Henshaw, April 19, 1914, refers to prices Eugene and south, and then says: "In my opinion there is no market price to-day in Oregon or Washington. Coates has also started to bust things wide open and is succeeding." Answer same day: Telegram received, mark time until you receive my letter."

Exhibit No. 4. Letter Jones to Henshaw, April 20, 1914. Refers to 'phone conversation, states no market price in Portland, also refers to Meier & Frank order, Guthrie McDougall, Miller & [456] Bauer. Refers to Coates Balfour-Guthrie fight.

Exhibit No. 5. Henshaw to Jones letter dated Apr. 25, 1914 at San Francisco don't imagine any prices are being seriously maintained in Oregon. Will try and find out what the attitude of California Mills is in regard to disturbance in the north want to pursue a reasonable and decent policy. Don't wish to be destroyers of the market. If it becomes necessary for them to sell will sell for the best price they can secure."

Exhibit No. 6. Letter Henshaw to Jones dated San Francisco Apr. 29, 1914, says if you have to sell cement on account of hardening, advisable to mention to Standard and Santa Cruz agents, also to Statter that your cement is hardening, and you



have to get rid of it. And also stated—"In the meantime we will have to mark time and not commit any overt act. I am sorry that conditions are again in such shape but we do not want to invite serious trouble down here."

Exhibit No. 7. Letter Henshaw to Jones dated San Francisco May 13, 1914 with reference to Dinwiddie contract, refers to threatened attack upon Southern California by Central California mills.

Exhibit No. 8. Telegram and letters Jones to Henshaw *re* Dinwiddie or Meyer & Frank job, discusses fight between Washington Companies quotes bids made by all companies on Meier & Frank job.

Exhibit No. 9. Telegram Jones to Henshaw May 27, 1914 discusses Eden quotation of \$1.45 f. o. b. cars on Dinwiddie job.

Exhibit No. 10. Letter Jones to Henshaw May 28, 1914 confirms telegram in No. 50, discusses Dinwiddie job and Eden bid.

Exhibit No. 11. Letter Henshaw to Jones dated San [457] Francisco June 1, 1914 discusses Eden in connection with Dinwiddie job. Also State Highway Engineer at Astoria bid, and says:

"The fact of the matter is conditions are so strained by Central and Southern California that I do not know yet what the result will be, but if it turns into a war (which I hope and pray will not be the case) I do not want to risk having any obligations of that kind in the north when I would only probably be helping out somebody else's game in the end. I will be glad to explain this more in detail to Senator Day when I come up there."

Exhibit No. 12. Telegram Jones to Henshaw June 1, 1914, understand Washington Mills differences patched up last Saturday, think Muhs can give you details.

Exhibit No. 13. Letter Henshaw to Jones dated San Francisco June 11, 1914, says Portland price is \$1.70, but advise with reference to cutting: with reference to 8000 barrel orders Columbia County take basis of \$1.70 Portland, and says: "I don't want to go any further toward disturbing the market unless it becomes necessary to do so."

Exhibit No. 14. Letter Jones to Henshaw dated July 2, 1914, says he stopped in at the Benson to see Coe and met Erlin, Coates and Eden. Understand Muhs also in town, does not know purpose of visit.

Exhibit No. 15. Jones to Henshaw, telegram July 3, 1914, says Muhs, Eden, Coates, Erlin in Portland yesterday; Crow & Co. quoting \$1.50 net, other cement companies state will not meet this quotation.

Exhibit No. 16. Jones to Henshaw, night letter-gram July 6, 1914, all companies quoting \$1.50 net cars or dock, except Balfour. Cannot get in touch with Hacker or Crow but understand new price made by California Mills to meet quotation [458] by Washington.

Exhibit No. 17. Letter Jones to Henshaw July 6, 1914, confirms telegram and discusses fight of Washington mills, also California mills.

Exhibit No. 18. Letter Jones to Henshaw July 11, 1914 discusses prices Washington fight, and

says: "When the Central California Mills established their new price I think they overlooked their hand in not making the reduction apply to out of town points as well," also "The reason the price was made \$1.50 was without question due to a desire on the part of Mr. Muhs or Mr. Erlin to reach the bottom at which their Washington competitors have apparently been selling to make business so unattractive the latter would be compelled to advance."

Exhibit No. 19. Telegram Henshaw to Jones dated San Francisco July 11, 1914. Refers to telegrams of 9th and 10th, and says: "I don't think California Mills mean to give any discount to dealers from the present price. Out of town dealers was not discussed, but you can doubtless find out from Pacific (Santa Cruz and Standard whether they are giving a discount to out of town dealers. Whatever they do we will do."

Exhibit No. 20. Telegram Jones to Henshaw July 31, 1914. Just confirmed information Central California Mills quoting \$1.90 net Portland. Out of town based on Portland. Knew last night Standard and Santa Cruz had instructions to make price but not to be effective until August 30th. Their instructions corrected this morning.

Exhibit No. 21. Letter Riverside Portland from Portland Office dated August 1, 1914 to Walther Williams Hardware Co., The Dalles stating price \$1.90 net dealers commission 10 cents, sacks extra.

Exhibit No. 22. Jones to Henshaw August 1, 1914: "Referring to present price of our competi-

tors of \$1.90 net Portland, it is my understanding from Crow & Company [459] and the Standard agent also McDonald of the Cowell Company that they have been positively instructed by their people not to allow any commission from this price to Portland dealers. It seems to be fully understood among them this was one of the objects which have been worked towards by their principles but to make sure they were all adhering to this, I asked McCracken to call them all up, with the result that he found Statter had received no instructions preventing him from allowing the usual dealers commission. The Washington Mills have never eliminated the dealer, consequently, their position is not changed. I am giving you this information as I thought it might be of interest in case you should have any discussion on the subject."

Exhibit No. 23. Telegram Jones to Henshaw dated August 1, 1914, acknowledges telegram of same date. Says instructions clear.

Exhibit No. 24. Telegram Henshaw to Jones August 1, 1914, "Afraid to quote below price established by competitors for fear dealer may disturb market by giving away part of commission. Specific contracts quote \$1.70 Portland base exactly as the others bid \$1.90 Portland base, but be sure man you deal with reliable and will not betray price, otherwise market will break."

Exhibit No. 25. Henshaw to Jones telegram August 7, 1914; Says understand competitor's price at Astoria \$2.18. If sure of this, no reason to go



lower, if not, continue as formerly instructed. Keep advised as to conditions.

Exhibit No. 26. Jones to Henshaw, Aug. 17, 1914. Discusses Astoria situation new sales based on \$1.90 net [460] Portland, Astoria wrought up on account of price based on Portland.

Exhibit No. 27. Letter Henshaw to Jones dated San Francisco August 19, 1914, discusses Astoria situation, price to be \$1.90 where delivered from boat, otherwise Portland freight added, and then says: "Now as you know, in the beginning of the year we set our price for the Portland market at \$1.70. We decided that we would not go above this price, but we would go below if our competitor drove us. Therefore with your Astoria dealer in naming the price of \$1.90 provided we can deliver the cement directly by vessel, he is to have 10 cents off. Moreover, at the end of the year we propose to give him another 10 cents which will bring us down then to our regular \$1.70 on all his purchases, but this last 10 cents is conditional, upon his keeping first, this matter secret, as we do not care to have other people know our methods of conducting our business. Second, that he does not use any of his commissions for reducing the price in order to make a sale. We cannot allow our dealers to disturb the market.

Exhibit No. 28. Letter Jones to Henshaw Aug. 24, 1914, acknowledges letter mentioned in Exhibit 68, and says: "This assumption that we can deliver cement in quantities as cheaply in Astoria as we can in Portland is correct, our arrangements

at that point being exactly the same as to cost and method."

Exhibit No. 29. Letter from Henshaw to Butchart Sept. 24: Says has been see Butchart in Victoria to discuss several matters. The first is Carl Leonardt, and says he advised that he would not stand patiently by and see another mill put up to add [461] more trouble, and the minute Leonardt put his cement on the market Henshaw would cut the price to where neither would make money. Second, discusses Oregon situation. Refers to probable purchase by Henshaw which will make a high grade cement very cheap. Wants Butchart to know situation before he goes into the Oregon mill.

Exhibit No. 30. Wm. G. Henshaw to Jones letter dated November 16, 1914, advises has practically decided to drop out of Portland market, make no further quotations, advise amount of cement on hand and commitments outstanding.

Exhibit No. 31. Letter Jones to Henshaw Dec. 5, 1914, Eden, Coates and Cameron of Balfour-Guthrie & Company left on Shasta this afternoon for San Francisco. Also telegram of same date saying Jones will be in San Francisco Thursday morning with data.

Exhibit No. 32. Letter to A. C. Steckle, Battle Ground, Wash. from Riverside Portland dated March 18, 1915, acknowledging order for  $11\frac{1}{2}$  barrels, Riverside withdrawn from market rather than delay shipment, have referred order to Henry Cowell.

Exhibit No. 33. Letter Jones to Henshaw March 9, 1915, refers to freight reductions on Interstate Bridge contract.

Exhibit No. 34. Telegram Wm. Pierce Johnson dated San Francisco June 5, 1915, to Tyler Henshaw at Portland. Says have price \$1.90 less one per cent f. o. b. Portland 1300 bbls. sacks extra, asks for help, expects to require about 3000 sacks for San Francisco delivery near future. Also day letter Henshaw to Johnson saying sending Portland order to Jones personally as he can help out about 20 cts. per bbl. Order cannot [462] go through San Francisco purchasing office. Cannot furnish Riverside but another California brand.

Exhibit No. 35. Day letter Jones to Henshaw July 6, 1915, "Representative from every cement mill in Pacific Northwest in San Francisco today, thought you might like to know."

Exhibit No. 36. Letter from Bend Company to Riverside Portland dated August 20, 1915, asked for quotations. Answer from Riverside Portland to Bend Company dated August 23, 1915. Not in position to quote owing to fact have withdrawn from cement market in this territory. Refers to possibility of another cement company entering market.

Exhibit No. 37. Letter dated Aug. 23, 1915, from Riverside Portland Cement Co, to Bend Company, Bend, Ore., stating that they have never handled lime and plaster; referred inquiry to The J. McCracken Company who is exclusive agent for Roche Harbor lime.

“There is a strong possibility of another cement company entering this field in the very near future.”

Letter from the Bend Co. dated 20 Aug. 1915, requesting quotations on cement, lime, plaster, etc.

Exhibit No. 38. Letter July 1, 1915, of Superior Portland Cement Co. to Pacific Bridge Co. including contract covering cement to be used in Vancouver-Portland Interstate bridge and the First National Bank Building.

Exhibit No. 39. Letter Henry Cowell Lime and Cement Co., Dec. 28, 1914, to F. M. Wylie advising that after the first of the year they would not be in Washington market with cement and stating how much the writer regretted losing the territory. [463]

Exhibit No. 40. Letter Treasury Dept., Feb. 2, 1915, from Dealers in building materials, reporting a combination by them in this territory made to hamper the sale of all cement here and in the adjoining territory of Hoquiam.

Exhibit No. 40. Letter to Treasury Department dated January 2, 1915, from Aberdeen Mfg. Co., W. R. Lebo & Co., and T. B. Darragh Co. complaint about combine.

Exhibit No. 41. Letter dated April 30, 1915, from Bennett Hardware Company, Vancouver to J. C. Eden, Seattle, where states if Coast Cement be used would probably have to go through Balfour-Guthrie. Saw Cement being unloaded from schooner at Pacific Bridge Co. dock—Suppose that it is a California proposition.



Exhibit No. 42. Bill of Superior Portland Cement Co. to Bennett Hdw. Co. dated December 1, 1915—135 bbls. cement at \$1.80 f. o. b. Vancouver plus sacks.

Exhibit No. 43. Bill of Superior Portland Cement Co. dated Oct. 5, 1916, to Bennett Hdw. Co.—231 bbls. at \$2.50 f. o. b. Vancouver, gross, allowance for sacks returned.

Exhibit No. 44. Letter Bennett Hdw. Co. Apr. 19, 1916, to Superior Portland Cement Co., relates to Crown-Willamette Paper Co. of Camas concerning several thousand barrels cement, recites main office in Portland and that prospect paying \$1.90 net and buying California Cement. Calls attention that prospect operates along line of steamers from Portland.

Exhibit No. 45. Letter 9 Aug. 1916, Bennett Hardware Co. to Superior Portland Cement Co. Seattle, stating Mr. Swigert of Pacific Bridge Co. said he would "give you more cement business when he moved across to this side." [464]

Exhibit No. 46. Letter Santa Cruz Portland Cement Co. signed by Muhs dated San Francisco Apr. 2, 1914, to Crow Portland, refers to Williams of Newport as buying in 25 barrel lots, not entitled to better price then states: "Despite what anyone else is going to do, we are going to use any influence to bring about proper sales conditions in the territories which we serve."

Exhibit No. 47. Letter Santa Cruz dated San Francisco July 9, 1914, signed by Muhs. Confirms verbal reduction making price \$1.90 including sacks

ex-dock Portland, price to apply from day to day. Job contracts closed at \$2.10 ex-dock. For 1915 deliveries \$2.30 ex-dock.

Exhibit No. 48. Letter Santa Cruz signed by Muhs dated San Francisco July 31, 1914, to Farrington, Portland, refers to commitments at \$2.10 or less. Confirms night letter of one day previous making price \$2.30 including sacks ex-dock.

Exhibit No. 49. Letter Superior Portland Cement Co. dated Mar. 24, 14, to F. T. Crow & Co. at Tacoma, quoting reduction from \$1.60 to \$1.50 barrel net factory concrete when purchased by State or County only.

Exhibit No. 50. Letter from Hacker to F. R. Muhs dated at Tacoma Apr. 10, 1914—"I believe the California mills are in error in not putting at least some cement into the Sound markets for when the present scrap between 'Washington' and 'Olympic' is over and they again decide to put prices to a legitimate figure the California Mills will not be considered, as both the Washington Mills will say that this is their own personal fight." Suggest threat to drive California Mills out of Oregon market. [465]

Exhibit No. 51. Letter Superior Portland Cement Co. from Seattle, signed Sutherland dated June 1, 1914, to F. T. Crowe & Co. Tacoma. Refers to order Olympia Hardware Co. and Gray at Puyallup a price of \$1.20 f. o. b. concrete instead of \$1.10, \$1.10 being railway price, and then says: "We have some hopes of getting price matters straightened out in the next few days and we will

get down then to some sort of a basis so that we will have some idea of what the price of cement really is."

Exhibit No. 52. Letter from W. E. Hacker from Tacoma, Wn., dated July 2, 1914, to Muhs at San Francisco: "Cement matters are progressing slowly. I think both Coats and Baillie are tired and would like to be good but the former especially, is suspicious and ready to start all over again if anything happened that he did not like. Also in Portland he is a man who will use any excuse to stir things up as an open market with a chance to make little cuts or just what he needs. The same is true in Seattle where G. B. & Co. are jealous of anybody else getting any business, and when they lose, insist that it is because of a cut."

Exhibit No. 53. Letter from Olympic Portland signed Balfour-Guthrie, Cameron from Seattle July 17, 1914, to F. T. Crow & Co. of same place quoting price \$1.90 net less 15 cts. commission, sacks extra.

Exhibit No. 54. Letter Superior Portland Cement Co. Seattle dated July 17, 1914, to F. T. Crow & Co. Tacoma quoting \$1.90 net f. o. b. Seattle.

Exhibit No. 55. Letter from Hacker at Tacoma dated July 23, 1914, to Muhs San Francisco acknowledges night letter of previous day acting on instructions selling cement day to day delivery \$1.50, future contracts \$1.70. [466] Sending Portland copy of letter. "The people in this state have finally seen some wisdom and I think that matters are in better shape than ever before in the history

of the business. Prices in Seattle, Portland and Tacoma are \$1.90 firm and if they will adopt a little policy as I outlined to them the other day, feel certain that it will stick."

Exhibit No. 56. Letter Superior Portland dated Seattle, Aug. 27, 1914, to F. T. Crow & Co. Tacoma, refers to telephone conversation and says: "It was agreed among ourselves that this order should come to us. We are consequently putting in a bid of \$1.85½ the same as we did last time; the Washington \$1.87½ and Balfour-Guthrie \$1.90 We would prefer that you do not bid on this at all but if you do kindly bid slightly above us and oblige." Refers to State Training School at Chehalis.

Exhibit No. 57. Letter from Superior Portland Cement Co. Seattle Dec. 31, 1914 to Crow & Co. same place, quotes price effective January 1, \$1.90 net no commission. Letter from Olympic Portland Cement Co. to Crow & Co. Seattle dated December 31, 1914, price Olympic \$1.90 net without commission. Letter Olympic Portland Cement Co. to Crow & Co. Seattle January 4, 1915. Acknowledges letter of 2d, says program properly outlined, will sell carlots \$1.90 net to any consumer, less carlots left to dealers. Also copy of letter from Crow to Olympic dated January 2. Also letter from Superior Portland Cement Co. dated Seattle, Jan. 12, 1915, to Crow & Co. Tacoma, requesting Crow to confine sales to Tacoma, that they would appoint separate agents for Centralia, Chehalis, Olympia, Sumner, Puyallup and out-



side points. Both other factories [467] are adopting same policy."

Also letter Superior Portland Seattle, Feb. 23, 1915, to Crow & Co. Seattle, relates to terms.

Exhibit No. 58. Letter Superior Portland dated Seattle Jan. 13, 1916 to Crowe & Co. Tacoma, quotes price \$2.15 including sacks f. o. b. Tacoma allow 7½¢ per sack.

Also letter Superior Portland dated Seattle Jan. 13, 1916, to Crow & Co. Seattle quotes \$2.30 f. o. b. Seattle including sacks, sack allowance 7½¢. Letter Washington Portland Cement Co. dated Seattle Jan. 12, 1916 to Crow & Co. Seattle, quotes effective same date \$2.30 f. o. b. Seattle including sacks, allowance sacks 7½¢. Also letter Olympic Portland Cement Co. dated Seattle Jan. 11, 1916 to Crow & Co. Seattle price \$2.30 f. o. b. Seattle including sacks, sack allowance 7½¢.

Exhibit No. 59. Letter Oct. 5, 1914, Superior to Balfour-Guthrie & Co. "My understanding of the arrangement with the California companies in Oregon is that the Washington companies after the first of the year should stay north of Salem.

Exhibit No. 60. October 5, 1914, Superior to W. C. Hall, Eugene, acknowledging letter of 29th ult. and stating Balfour-Guthrie & Co. are agents in Oregon.

Exhibit No. 61. June 11, Superior to St. Paul and Tacoma Lumber Co., North Yakima, Washington: "At present time we have advanced prices here 20¢ and expect to get an organization com-

pleted in the near future and boost it a little more. If this is done we may try to induce the Spokane plants to get together but it looks like [468] a hopeless thing over there."

Exhibit No. 62. Superior to F. G. Foster, Hoquiam, Aug. 21, 1914. "Please be advised that under mutual agreement between ourselves and the Washington Portland Cement Co. you are to represent Superior Portland Cement in the town of Hoquiam."

Exhibit No. 63. Letter Superior Portland dated Seattle Feb. 10, 1914, to Galbraith Bacon & Co., Seattle, encloses price list covering King County, awards agency for King County, fixing commission at 15 cts. a barrel, and states charge to Galbraith Bacon & Co. will be \$1.75 net f. o. b. cars. Also letter Washington Portland Cement Co., dated Seattle, Feb. 10th, to same parties. Enclosing price list for King County, dealers commission 15 cts per barrel. Also letter from Olympic Portland Cement Co. dated Seattle, Feb. 10, 1914, enclosing price list King County, dealers commission 15 cts per barrel.

All three letters withdraw consignment and state same terms of payment.

Exhibit No. 64. Letter Santa Cruz signed by Muhs dated San Francisco June 16, 1914, to Galbraith Bacon & Co. Seattle: "I certainly hope that you will be successful in securing the patents and that by the time you get them the cement market in your vicinity will have again reached "The California Price" Standard and that the demand

for the product will be such as to warrant you going ahead with the proposed plat.”

Exhibit No. 65. Letter Olympic Portland Cement Co. dated Seattle July 17, 1914, to Galbraith Bacon & Co. quotes price \$1.90 net f. o. b. Seattle 15 cts. commission, sacks extra.

Exhibit No. 66. Night lettergram Galbraith Bacon [469] to Muhs at San Francisco dated Seattle Oct. 26, 1914, refers to Twin Peaks Tunnel, asks for bids on Army Quartermaster for 14,000 barrels Honolulu Superior Washington both \$1.90 net. Reply Oct. 27, states prices referred to \$2.30 f. o. b. dock, \$2.40 with paper liners.

Exhibit No. 67. Letter Washington Portland Cement Co. dated Seattle Dec. 31, 1914, to Galbraith Bacon Co. Seattle, carlots \$1.90 net f. o. b. Seattle without dealers commission, sacks extra. Also letter Olympic Portland Cement Co. dated Seattle, Dec. 31, 1914, to Galbraith Bacon Co. Seattle, price Olympic \$1.90 net Seattle carloads, without commission, sacks extra.

Exhibit No. 68. Telegram from Galbraith Seattle Jan. 4, 1915, to Cameron, San Francisco (Santa Cruz) quote Blue Cross Cement shipments immediately if price satisfactory. Coats has ditched us. Reply same day.

“Our absence from Seattle market for several years has put us out of touch with conditions there. Mr. Muhs or myself will be in Portland within two weeks and will take up this matter with you at that time. Will do nothing until we see you.”  
Signed Cameron.

Also letter Galbraith Bacon to Cameron Jan. 6, 1915, states in the open market for cement business. Acknowledges telegram of 4th. Also letter Santa Cruz—Cameron, dated San Francisco Jan. 12, 1915, to Galbraith Bacon, Seattle. Acknowledges letter of 6th, says cannot be in Portland on date mentioned, have asked Muhs to do so and discuss marketing cement in Seattle. Says has opened office in Portland and handling Washington [470] business from that office and under circumstances will not be possible for Galbraith Bacon to handle their product in Seattle.

Exhibit No. 68. Also telegram Galbraith Bacon Seattle Mar. 6, 1915, to Geo. T. Cameron, San Francisco resale, Port Commission 20,000 Blue Cross delivery next six months \$2.00 per barrel Santa Cruz, to pay storage and wharfage handling and freight on returned bags; would net \$1.75 shipslings Seattle, keep confidential. If not interested, decline but do not spill the beans. Also reply, offer declined, many thanks."

Exhibit No. 69. Letter Olympic Portland Cement dated Seattle Jan. 11, 1916, to Galbraith Bacon, quotes immediate price \$2.30 f. o. b. Seattle including sacks, sack allowance  $7\frac{1}{2}c$ . Also letter Washington Portland Cement Jan. 12, 1916, to same parties, quotes \$2.30 Seattle including sacks, sack allowance  $7\frac{1}{2}c$ . Also letter Superior Portland Cement Co. dated Seattle Jan. 13, 1916, same parties quotes \$2.30 f. o. b. Seattle sack allowance  $7\frac{1}{2}c$ .

Exhibit No. 70. Letter Henry Cowell dated San Francisco Feb. 21, 1916, to Galbraith Bacon, refers



to letter of 15th, declines order of 2,000 bbls. Mt. Diablo on terms offered. Says wired on Jan. 22d price of \$2.45 including bags. Will accept order at price quoted.

Exhibit No. 71. Letter Oregon Portland Cement Oswego Mar. 6, 1916, to Galbraith Bacon Seattle, letter signed by Aman Moore, says awaiting return of Butchart of California before discussing agency further. Expects to begin shipment May 1st.

Exhibit No. 72. Telegram from Galbraith Bacon, [471] Seattle June 6, 1916 Oregon Portland: "Can you supply us with cement now? If so, quote price 5,000 barrels shipment to start at once at rate of say, three cars per week, wire answer." Also answer of same date: "Quote you Oregon Portland Cement \$2.68 barrel including sacks f. o. b. Seattle dealers discount 10c barrel."

Exhibit No. 73. Letter from Galbraith Bacon Seattle June 4, 1916, to Oregon Portland Cement, acknowledging telegraph quotation, doing better there, if any change quote new prices.

Exhibit No. 74. Letter from Eden to W. H. George, San Francisco dated Apr. 18, 1916, am sorry to have missed him on recent visit to San Francisco, refers to wonderful party two months previous. Refers to Association matters. Also reply of George to Eden bearing date Apr. 24, 1916, refers to Association matters and suggestion for a Coast Association. These are the "Dear Will" and "Dear Jack" letters.

Exhibit No. 75. Contains telegrams from Muhs to Eden, Superior Portland to Muhs, Kenny to

Eden, Muhs to Eden, Eden to Muhs, Eden to Coats, Woodworth to Eden, Coats to Eden and similar telegrams and correspondence all dated March, 1915. Referring to "Interstate Bridge Contract and special Spokane Rate."

Exhibit No. 76. Letter from Eden to Aman Moore dated March 25, 1916. Offers to help by furnishing information concerning black base paving and then states: "But inasmuch as we will probably not participate in the cement tonnage of the State of Oregon we cannot see our way clear to assume any part of the expense of the promotion work." [472]

Exhibit No. 77. Letter from Santa Cruz, Muhs dated San Francisco Aug. 2, 1916, to Eden at Seattle, refers to inspection work at Tillamook. Also letter of Eden to Muhs dated July 29, 1916, relating to Tillamook says: "When the Northern Mills were marketing cement in Oregon we made it a practice to employ an inspector of our own in the Tillamook district, and as a result we have first-class pavements in that county to date. The representation of Aronz as a Skinner is very bad, he having had four contracts in this state and skinned every one of them."

Exhibit No. 78. Letter from Foster & Company, Hoquiam of Aug. 4, 1916, to Washington, Olympic and Superior Cement Companies, recites orders for 6,000 barrels and that equitable distribution will be made to each company. Also letter from Olympic Portland Cement Co. dated Seattle Aug. 18, 1916,

to Foster at Hoquiam. Acknowledged letter of 4th, and says will ship their portion.

Exhibit No. 79. Letter Olympic to Portland dated Seattle Sept. 21, 1914, to Foster Hoquiam, quotes price, and says: "It is our idea that you handle our cement in Hoquiam on the same basis as you do the Washington, and give us a fair share of the tonnage going in your market." Also letter from Foster to Olympic dated Sept. 18, discussing prices and says: "We are anxious to have your cement trade down here and I take it from Mr. Coats that we were expected to represent the three cement companies in Hoquiam territory, but nothing was put up to us as to just what distribution of the orders should be made. Would like to have you put us wise in the matter."

Exhibit No. 80. Letter Auburn Furniture to Oswego asking price. Reply Oregon Portland, Feb. 23, '16, stating factory not ready. Can you wait? Letter from Hollister to Auburn May 4, '16, "unable to secure satisfactory rates in [473] that territory and will write again soon."

Exhibit No. 81. Santa Cruz to Salem Sewer Pipe, Aug. 16, 1916. Will allow discount 5c per barrel.

Exhibit No. 81. Letter Santa Cruz Portland from Maher agent at Portland dated August 16, 1916, to Salem Sewer Pipe Company, allows discount of 5 cts per barrel for payments in ten days.

Exhibit No. 82. Letter from R. P. Butchart to Aman Moore dated Sept. 14, 1915.

Exhibit No. 83. Letter from Butchart to Aman Moore dated May 14, 1915.

Exhibit No. 84. Letter from Butchart to Aman Moore dated May 16, 1915.

Exhibit No. 85. Letter from Butchart to Aman Moore dated May 22, 1915.

Exhibit No. 86. Letter from Butchart to Aman Moore dated June 14, 1915.

Exhibit No. 87. Letter from Aman Moore to R. P. Butchart dated Dec. 23, 1915.

Exhibit No. 88. Letter from Butchart to Aman Moore dated Dec. 29, 1915.

Exhibit No. 89. Letter from Aman Moore, Oswego Dec. 31, 1915, to R. P. Butchart Todd Inlet B. C. answering Butchart's letter of the 29th, and says: "I note what you say in regard to the selling arrangement for our Company. As you know it has been the universal practice in this country for a new plant when entering the market to force its way in by cutting prices." He then calls attention to other plants which have cut prices. "If we can establish our own market without cutting prices we will have performed a miracle. I believe, however, that with your acquaintance and friendship with the Washington and California companies you should be able to bring about [474] such a result." He then suggests Butchart shipping cement from Todd Inlet to Portland, and further on says: "Under these circumstances the Washington companies should withdraw their selling agency from Portland, or otherwise should not object if we should go into the Seattle and Puget Sound markets.



It seems to me you could handle this to the best advantage owing to your friendship with Mr. Coats."

Exhibit No. 90. Letter from Butchart to Aman Moore dated Dec. 30, 1915.

Exhibit No. 91. Letter from Aman Moore to R. P. Butchart, dated Feb. 11, 1916.

Exhibit No. 92. Letter from Butchart to Aman Moore dated February 15, 1916.

Exhibit No. 93. Letter from Butchart to Aman Moore dated February 21, 1916.

Exhibit No. 94. Letter from Butchart to Aman Moore dated March 2, 1916.

Exhibit No. 95. Letter from Aman Moore to R. P. Butchart, dated March 6, 1916.

Exhibit No. 96. Letter from Butchart to Aman Moore, dated March 14, 1916.

Exhibit No. 97. Letter from Butchart to Aman Moore, dated March 31, 1916.

Exhibit No. 98. Letter from Aman Moore to John C. Eden at Seattle, dated Mar. 28, 1916. Referring to offer to have Reitz assist in fight *in re* Warren Construction Co. Letter from Eden to Moore dated April 3, 1916, referring to use of Reitz and then stating: Northern Mills as you know spent a lot of money in the fight we conducted in Multnomah County a few months ago and even though we will probably be out of the cement business in Oregon when your plant starts and would naturally dislike to hear that part of our work at least has been nullified by the action of the Warren people. [475]

Exhibit No. 99. Letter dated January 27, 1916, from Oregon Portland Cement to all dealers and users of Portland Cement announcing completion of their plant in the near future etc. Letter signed by Aman Moore.

Exhibit No. 100. Letter from Olympia Hdw. Co., Olympia, Feb. 11, 1916, to Oregon Portland Cement Co. Refers to circular letter of Jan. 27, 1916, asking for quotation and reply dated Feb. 18, 1916, saying it will be April before in condition to make shipments; in the meanwhile representative will call to make arrangements for prices and terms.

Exhibit No. 101. Letter from E. G. Cox Lbr. Co., Walla Walla to Oregon Portland Cement Co. Feb. 28, 1916. Refers to circular asking for prices and exclusive agency. Reply dated Mar. 1st saying they will send Mr. Hollister to confer.

Exhibit No. 102. Letter from City Engineer, Walla Walla dated Feb. 1, 1916, asking for prices. Reply dated Feb. 7, 1916, saying price will be fixed on factory cost and freight rate. No rate as yet and will have representative call.

Exhibit No. 103. Denny Rennon to Oregon Portland, March 6, 1916, thanking for quotation cement f. o. b. Seattle. Reply dated March 11: "Butchart returning from California. Awaiting arrival before making final arrangements."

Exhibit No. 104. Telegram Cowell dated San Francisco Aug. 2, 1915, to Lebo, Aberdeen: "Cannot accept contract, writing." Also letter withdraws \$2.40 quotation, quotes \$2.70 less usual sack allowance, dealers commission and cash discount.

Exhibit No. 105. Cowell to Southwestern Portland, Feb. 1, 1916, inclosing a little suggestion which I trust will be interesting. Have found it to work to best possible advantage. Ans. Feb. 7, stating some manufacturers seem to [476] think no one else can remain in same business but this is a free country and any combination to ruin a competitor by misrepresentation and crookedness is wrong.

Exhibit No. 106. Letter from Henry Cowell Portland to Alderman, Astoria. Refers to Warrenton business, says Mr. George has probably written direct concerning Astoria situation and price of \$2.45 at Warrenton, and then says: "I agree with you old man that the price should be same as at Astoria, but it is not the will of the Lord High Executioner."

Exhibit No. 107. Letter from Henry Cowell dated San Francisco June 30, 1916, to Astoria Feed and Supply Co. effective June 30, price \$2.58 delivered Astoria less sacks deduction and dealers commission 10 cts.

Exhibit No. 108. Same to same, dated June 30, 1916, price delivered at Warrenton \$2.73, usual sack deduction and 10 cts per bbl. to dealer.

Exhibit No. 109. Oregon Portland Cement Co. quotation dated Portland June 30, 1916, to Astoria Fuel and Supply Co., quotes \$2.58 f. o. b. Astoria, sack allowance 10 cts. one per cent discount, dealers discount at 10 cts. per bbl., no allowance for dockage or warehouse.

Exhibit No. 110. Letter from Santa Cruz Portland Cement Co., at Portland Feb. 4, 1916, to San-

born at Astoria enclosing copy of agreement for handling Santa Cruz at Astoria and copy of contract fixing price at \$2.30 f. o. b. dock Astoria.

Exhibit No. 111. Letter from Santa Cruz at Portland to Sanborn, Astoria dated June 29, 1916, quoting price \$2.58 f. o. b. dock or cars.

Exhibit No. 112. Letter from Pacific Portland Cement Co. at Portland to Sanborn at Astoria dated June 30, 1916 quoting \$2.58 on Golden Gate, price to apply on shipment [477] at Portland or direct from mill. Seaside and Gearhart \$2.83, Warrenton and Ft. Stevens \$2.73 and says advanced by reason of increased freight rates.

Exhibit No. 113. Quotation from Oregon Portland Cement Co. to Sanborn dated July 26, 1916, quoting price \$2.58 f. o. b. Astoria.

Exhibit No. 114. Bill from Santa Cruz Portland at Portland Feby. 23, 1915, to Gilbert & Son, Seaside, car cement \$2.56 f. o. b. Seaside.

Exhibit No. 115. Letter from Santa Cruz Portland Cement Co. at Portland dated June 29, 1916, to Gilbert & Son Seaside quoting price f. o. b. Seaside, car lots \$2.83 regular dealers commission.

Exhibit No. 116. Letter from Washington Portland Cement Co. at Portland to Clark, Purchasing Agent, S. P. & S. dated April 4, 1916, saying: "Owing to extreme shortage of cars and the coming into the market of the Oregon Portland Cement Co., we are withdrawing from this market and closing our Portland office.

Exhibit No. 117. Letter from Pacific Portland Cement Co., San Francisco to same at Portland



dated Mar. 24, 1915. Refers to telegram from Portland reading: "Bellingham Bay Improvement Co. of Bellingham, Wn. telephoned us for price 15,000 bbls. May, June and July delivery f. o. b. Bellingham. Shall we quote \$2.40," and then says: "The present list price of the Washington Mills is \$2.30 f. o. b. Bellingham. We have telegraphed you it is quite in order for you to quote as you desire, and if business is received by us on this basis we shall certainly be glad to fill it." Also telegrams referred to in such letter.

Exhibit No. 118. Letter from Pacific Portland Cement Co. San Francisco to same at Portland quoting price to dealers [478] \$2.30 f. o. b. cars union depot less \$2.30 gross and 10 cts. per bbl. commission and to consumers \$2.35 wagon load lots in short haul.

Exhibit No. 119. Letter from Pacific Portland Cement Co., San Francisco dated June 12, 1916 to same at Portland discussing price at Astoria as \$2.30.

Exhibit No. 120. Letter from Pacific Portland Cement Co., at Portland dated June 20, 1916, to same at San Francisco, referring to City bids, and reply, saying submit regular price \$2.30 f. o. b. dock, \$2.35 short haul, \$2.45 long haul.

Exhibit No. 121. Letter from F. W. Erlin, San Francisco July 22, 1916, to Clark Moore, Colorado Portland Cement Co. at Denver asking that on his next visit to Portland to come to San Francisco and then saying: "We have been discussing a certain matter here in connection with the dealer sit-

uation in Portland that I think you should be advised of before you come to Portland again."

Exhibit No. 122. Letter from Pacific Portland Cement Co., San Francisco dated Aug. 16, 1916, to same at Portland, advising change in dealers commission Portland from 10 cts to 15 cts per bbl. and change in terms from one per cent thirty days to 5 cts per bbl. cash discount ten days, also that they will adopt in Oregon  $7\frac{1}{2}$  cts sack allowance.

Exhibit No. 123. Telegram Pacific Portland Cement Co. at Portland dated Aug. 12, 1916, to Erlin, San Francisco, "Glen at The Dalles says Oregon Portland offers  $2\frac{1}{2}$  cts unloading charges, we have the business. Will you take this up with Clark Moore" Reply—"Believe this report incorrect and stand at." Letter confirming telegram.

Exhibits No. 124 to 129. Report from Commissioner of Finance *in re* City Bids on cement. [479]

Exhibit No. 130. Letter from Santa Cruz Portland Cement Co., Portland dated Aug. 4, 1916, to State Highway Department, Salem, quoting price for Leons Bridge at \$2.30 f. o. b. Portland, saying carry stock at Eugene and quoting price \$2.83 at Eugene. Also letter from Pacific Portland Cement Co. at Portland dated Aug. 2, 1916, to Lewis State Highway Engineer, quoting the Leons Bridge at \$2.30 f. o. b. Portland.

Exhibit No. 131. Letter from R. P. Butchart, Detroit July 14, 1916 to Clark Moore at Denver. Refers to effort of competitors to glut market prior to entering of Oregon Portland Cement Co. and his impression that sales to points outside of Portland

that Portland price would obtain. This Portland price plus freight. And reply from Clark; refers to 4,000 bbl. contract of Washington County for county to be taken over by Oregon Company.

Exhibit No. 132. Letter from Hollister, Portland July 18, 1916, to Clark Moore Denver, refers to Northwest Steel purchase and cut in city zone hall by Tate.

Exhibit No. 133. Telegram J. E. Moore Aug. 22, 1916, to Clark Moore at Denver: "California Companies will apply 5 cts per bbl. cash discount on all their city trade; our dealers must do same to meet them. Is this correct."

Exhibit No. 134. Night letter J. E. Moore Portland Aug. 29, 1916, to Clark Moore Denver: "Bitter complaint in directors' meeting because we do not sell in Vancouver, lawyers also kick to beat the band, don't you think it best to establish agency there. Do not see how we can get around it with things going the way they are. I advise it."

Exhibit No. 135. Telegram J. E. Moore Portland Aug. 15, 1916, to Clark Moore on San Francisco train saying all [480] dealers notified in less than one hour. Refers to car shortage and using flats with tarpaulin for cover.

Exhibit No. 136. Letter from J. E. Moore Portland Aug. 12, 1916, to Clark Moore, San Francisco, discusses trick played by Hobson & Haskins, and then says: "Of course I understand this is a critical time and I do not wish to do anything that will hamper the present arrangements or arrangements which you expect to make in the very near future

so I will say nothing to McDonald about Hanson but it is absolutely necessary that we have this man Hanson eliminated from this business in Oregon, or we must have the privilege of meeting his dirty tracks.

Exhibit No. 137. Letter of Clark Moore bearing date April 19, 1916, written by either J. E. Moore or Hollister referring to office matters and then saying: "We called on Mr. Maher, sales manager of the Santa Cruz Portland Cement Co. He is out of the city but will return to-morrow. We will again call on him and advise him of your call." Also referring to Holmes soliciting slush fund on Salem Bridge and saying will see Statter and go further into the matter.

Exhibit No. 138. Letter from Clark Moore Denver April 27, 1916, to Hollister, Portland, referring to maps showing freight tariff and then says: "Regarding Washington and Olympia Portland Cement Companies selling cement in Portland again on a temporary arrangement, would say for your information it is my understanding that they have some contracts they are completing."

Exhibit No. 139. Letter from Clark Moore at Denver to Hollister Portland dated May 5, 1916, concerning Grand View project and saying: "This is somewhat out of our territory and reply advising him that [481] Grand View is in Central Oregon and rates being in our favor we can reach it."

Exhibit No. 140. Telegram Clark Moore, San Francisco May 25, 1916, to Hollister Portland: "De-



layed in San Francisco, will be in Portland Monday."

Exhibit No. 141. Letter from Hollister Portland to Clark Moore at Denver, June 5, 1916, and says: "In talking with Statter today he stated that it (Statements made by Ash to Corvallis) was a bluff and he is in favor of cutting him out as a dealer. I will sound out the others and advise."

Exhibit No. 142. Letter from Hollister to Clark Moore dated July 12, 1916. Refers to advice from Robinson that some one had sold Northwest Steel Co. 50 bbls. California Cement at \$2.35 delivered. Check this up with Statter and says price given by Tate, a transfer man who cut his hauling charges. Reports J. E. Moore sending orders from Eugene and will be in Ashland next day, and then says: "From the papers there seems to be considerable work east of Umatilla. We have had two or three inquiries for quotations from that section in reply to the circular letter you dictated, and we are quoting on the basis of \$2.30 Portland." Refers to receipt of order from Dayton, Wn. Also letter from Moore, Denver to Hollister, Portland July 17, 1916. Refers to Northwest Steel Co. matter.

Exhibit No. 143. Letter from Hollister to Clark Moore at Denver bearing date July 13, 1916. Refers to quantity of Balfour-Guthrie cement on docks and check other wharves to find amount of outside cement on docks.

Exhibit No. 144. Letter from Clark Moore of Denver to Hollister at Portland dated July 19, 1916, *re* Gresham shipments and question of Santa

Cruz people allowing 19 cents per bbl. freight. [482]

Exhibit No. 145. Letter from Oregon Portland to Auburn Furniture Co. May 4, 1916, acknowledges inquiry and says doubt if they can quote attractive prices owing to freight rates. This letter contains pencil memorandum from Hollister to Moore calling attention to fact that Auburn between Tacoma and Seattle, and that these parties may be friends of Washington Factory seeking data.

Exhibit No. 146. Letter from Oregon Portland Cement Co. to Chehalis Brick & Tile Co. June 10, 1916, in reply to letter from them concerning jobbing agency at Chehalis. Letter says not intention to establish jobbing agency anywhere and when output is sufficient to take care of tributary territory will communicate with them.

Exhibit No. 147. Telegram Aberdeen Mfg. Co. June 13, 1916, to Oregon Portland Cement Co. asking for price on 3000 bbls., and letter replying saying, "Just starting manufacture and taking care of immediate need before reaching outside territory."

Exhibit No. 148. Letter from F. R. Clark, Purchasing Agent Centralia to Oregon Portland Cement Co. dated Apr. 25, 1916 asking for prices and reply saying, "Unable to quote until rate question is settled."

Exhibit No. 149. Letter from John Hughes, Centralia May 16, 1916 to Oregon Portland Cement Co. asking if manufacturing has started, and if so to furnish quotations, together with reply: "About ready to start manufacture. As soon as in

position to make shipments will send representative."

Exhibit No. 150. Letter from Oregon Portland Cement Co. dated June 8, 1916, to Kleinschmidt Hardware Co., Baker. Quotes price on order given Hollister as \$3.29 f. o. b. Baker, discount 5 cts. per bbl., 10 cts. sack allowance. [483]

Exhibit No. 150. June 8, 1916, Kleinschmidt, Baker, Oregon, quoting price.

Exhibit No. 151. Skinner, notice will publish rate 13½ cents on cement from Irwin, Washington to Vancouver and Portland if Irwin plant secure contract for Interstate Bridge.

Exhibit No. 152. Letter International to Skinner replying to memo: Have secured contract, please publish rate with least possible delay.

Exhibit No. 153. International to Skinner, March 11, 1915, "Did not receive copy of tariff. Must have effected earliest date. Reply Skinner: Hands tied temporarily, will advise definitely few days."

Exhibit No. 154. Missing.

Exhibit No. 155. Invoice Oregon to Tum-a-Lum Lumber Company.

Exhibit No. 156. Letter from Geiser Hotel to Oregon, March 9, 1916 *re* order taken from Kleinschmidt.

Exhibit No. 157. Letter 3/8/16 from Hollister at La Grande *re* order taken Knitte and price of Lehigh and International.

Exhibit No. 158. Hollister from Pendleton inclosing order from the yard of Tum-A-Lum.

Exhibit No. 159. Butchart to stockholders. Gross profit five months \$28,000.00.

Exhibit No. 160. Letter to Oregon Portland Cement Co. *re* daily forms apparently of output of price and difficulty because quarry away. Cost of manufacture approx. \$1.20 per barrel. The cost in July will not exceed \$1.00.

Exhibit No. 161. To Colorado Portland, June 21, 1916, *re* Aman Moore attempting to get back as general manager Oswego. [484]

Exhibit No. 162. Clark Moore to McCracken July 8, 1916, thanks for nice advertising.

Exhibit No. 163. Excerpts from letter May 18, 1916, *re* Association meeting Chicago. [485]

#### DEFENDANTS' EXHIBITS.

Exhibit No. 1. Constitution of Association of American Portland Cement Manufacturers.

Exhibit No. 2. Letter May 18, '15, to Butchart. Letter *re* incorporation.

Exhibit No. 3. Letter May 16, '15, to Butchart from Aman Moore *re* pavement and talk made by Moore to Commissioners, part of talk explaining a way possibility of cement trust. Also relates conversation with Nickerson *re* price to be given in order to take business away from Warren.

Exhibit No. 4. Letter Aman Moore—Butchart May 17, 1915, *re* Moran coming to bid and his being absolutely safe to tie up with. Decided to incorporate Utah.

Exhibit No. 6. Aman Moore's complaint Circuit Court vs. various corporations.



Exhibit No. 7. Letter Aman Moore—Butchart June 19, 1916, complaining about work on the new factory and the exceeding of cost and inefficiency.

Exhibit No. 8. Letter Moore to Minor June 19, 1916, *re* reorganization directors.

Exhibit No. 9. Alexander and Baldwin, Seattle, to Oregon Portland, Feb. 1, '16: Pleased to note that you will be in a position on or before April 1 to place your product on the market. Would like interest in shipping to Hawaiian Islands.

Ans: Feb. 2, would like to compete in Hawaiian Islands if can ship direct from Portland.

Ans: Feb. 7 *re* price California plants on cement shipped to Islands. Suggest put your prices f. o. b. steamer Portland.

Ans: Feb. 9, not understood at present time but may take it up later. [486]

Exhibit No. 10. Letter from Aman Moore to Butchart *re* a matter of paying in 25% before ——— paid his 50% with reference to the plan of reorganization. Also *re* cheques at Ladd Bank.

Exhibit No. 11. Telegram Moore Butchart Aug. 17, 1915, *re* loan Ladd & Tilton and incorporation.

Exhibit No. 12. Letter July 25, 1916, from W. M. to Aman Moore in answer to letter dated July 24th addressed to directors of Oregon Portland Cement Company demanding immediate directors' meeting in order to gain information for purpose of instituting suit under Federal "treble damage statutes" for damages through alleged illegal agreement. Discussion of method of calling directors' meeting.

Exhibit No. 13. Letter August 29, 1916, signed

W. M. to Aman Moore demanding opportunity to investigate the facts upon which this suit was brought in the name of the Oregon Portland Cement Company.

Exhibit No. 14. Letter April 10, 1914, signed Aman Moore to R. J. Morse. One paragraph introduced as exhibit: "The second proposition for Mr. Boettcher to decide is a matter of a selling contract with the Balfour Guthrie Company here to handle our output. I do not want to be quoted as making any definite statements, but believe they would contract to sell our output on a basis of ten cents per barrel margin to them for taking the account, and in closing such a contract would possibly subscribe fifty thousand dollars into our company. Further, they would draw a line at, say, Centralia, Wash., as a dividing point, for the Bellingham cement and our own, i. e., they would handle Bellingham cement north of a certain point in Washington, and handle our cement south of that point and throughout Oregon territory. I believe this would serve as a very important factor in maintaining prices here on the coast, as the Bellingham [487] plant withdrawing from Oregon would be able to renew the old agreement with the California plants, to withdraw from the Puget Sound territory, which would leave the market here to the California plants and ourself. The California plants in the past have conceded the output of two thousand barrels a day to ourselves in event we should build a two kiln plant. The negotiations with the Balfour-Guthrie Company are only

in a preliminary stage, although they have been discussed on several occasions in the past. Absolutely nothing can be done with them until we are fully financed and construction work resumed. They would not subscribe a dollar under present conditions or under any conditions other than with our plant a going concern."

Exhibit No. 15. Letter May 19, 1914, signed A. M. to R. J. Morse. Two paragraphs introduced:

1st paragraph: "Mr. Wilcox had previously raised the question as to the marketing of our output, due to curtailment of construction work, in the city of Portland. We had investigated the matter very thoroughly and decided that, even under the present adverse conditions, we could readily market the output of a one thousand barrel plant and would still have to secure only about one-third of the present market. Mr. Wilcox was thoroughly convinced that it would be the wrong thing to do to delay matters, and that we should proceed immediately to build the plant. Furthermore, with the resumption of building activities and prosperous times, we would undoubtedly have to increase the plant to a capacity of anywhere from two to four thousand barrels per day. I am enclosing herewith a blue-print map, that was prepared at the request of Mr. Leigh Hunt of the Hunt Engineering Company, which will set forth the Pacific Coast situation very clearly."

Stating the first proposition of Mr. Hunt one year before had been dropped on account of not being [488] favored by Mr. Boettcher and want-

ing unanimous approval. Subsequently Mr. Hunt negotiates deal with San Juan Portland Cement Company to complete their plant on certain basis with the stockholders. The idea being conceived of Pacific Coast selling arrangement with string of plants from Mexican border to Canadian line, approximately 300 to 400 miles between each plant, and suggested locations of plants.

Mr. Hunt states "that some years ago Kansas plants had gone to a great deal of expense to work out a selling agency that was legal and not in conflict with the Sherman Anti-Trust Law." Proposes same arrangement. Explains selling plan showing the commission allowed on the output from any mill, and that each plant would on a *pro rata* interest in the selling agency on a basis of annual output. Mills to keep separate books but selling agency to handle output of all factories and such other factories as desire to join in. Selling agency to be maintained without profit to itself and to use profit in useful advertising. Extols such selling agency as cost of selling to be minimum and maximum price to the mills and prevent dumping of surplus in one locality. In case Northern California mills attempt dump cheap cement in Portland, San Juan plant would cut market demanding a withdrawal and maintenance of prices. States Mr. Leonardt agreed to enter such selling agency with his plant, explains financial holdings in other plants and method of getting other plants into same agency. At meeting yesterday unanimous opinion, if such arrangement carried out



legally not conflicting with Sherman Anti-Trust Law would be very beneficial explaining price would average 25¢ or 30¢ per barrel more under this arrangement; that price could be maintained of \$1.75 to \$1.85 per barrel on entire coast through such agency; whereas California plants without such agency could sell at \$1.55 using this as dumping ground without a factory in [489] California allied with our own to protect the entire situation. Estimates amount which would be sold in Portland during the year, then says: "This territory would be divided so that there would be no conflict either from the outside mills or from the Gold Hill or Oswego factories. The Gold Hill would market all its output in Northern California and Southern Oregon and the southern part of the Willamette Valley: Oswego would dispose of its output in the northern part of the Willamette Valley, the city of Portland and points up and down the Columbia River on both sides, also the territory in southwestern Washington south of Centralia or Olympia where the freight rates would be the same or better than the Washington Mills shipping in from the north."

Selling agency as proposed could adjust these matters so that each plant would receive the greatest benefit possible and highest factory prices.

Exhibit No. 16. Letter Astoria Fuel & Supply Company to Oregon Portland Cement, October 4, 1916, ordering immediate shipment of four carloads of cement.

Ans: October 6th stating shipped one car on 4th, loading another to-day, will send balance as soon as possible.

Exhibit No. 17. Muhs to Cameron *re* demoralized condition of market Seattle.

Exhibit No. 18. Muhs-Cameron *re* active campaign Balfour here. Also lower prices will stay this year and suggest California mills leave prices this territory.

Exhibit No. 19. Muhs-James quoting price standard cement Portland to be \$2.30 ex dock. Telegram followed changing word "August" to "July."

Exhibit No. 20. Gay to Standard Portland quoting price cement in Oregon to be \$2.30 per barrel f. o. b. dock Portland.

Exhibit No. 21. Letter Santa Cruz Cement Co. to Mr. [490] Crouch of Roseburg and Mt. Diablo and Golden Gate Cement on sale \$2.50 Roseburg which is better price than he is able to offer.

Ans: Feb. 19, Thinks Crouch's idea on price must be wrong.

Exhibit No. 22. Muhs to C. M. Moore *re* freight lists.

Exhibit No. 23. Muhs-Moore June 1, 1916, inclosing freight schedule as per promise.

Exhibit No. 24. Superior to Inman-Poulsen, June 26, quote Superior cement at \$2.30 per barrel f. o. b. Portland.

Standard to Inman-Poulsen, June 26, 1916. Quote Standard f. o. b. Portland \$2.30 gross per barrel.

Pacific Portland to Inman-Poulsen, June 26, Golden Gate cement at \$2.30 per barrel f. o. b. general freight yards Portland.

Cowell to Inman-Poulsen, June 27, quote Mt. Diablo cement \$2.30 per barrel, \$2.35 your spur.

Santa Cruz to Inman-Poulsen, June 26, Santa Cruz cement \$2.30 gross per barrel.

Oregon to Inman-Poulsen, July 12, quoting Oregon brand cement f. o. b. your plant 2.35 per barrel.

Exhibit No. 25. Oregon Portland to Tacoma Dredging, June 17, quoting \$2.55 per barrel carload lots f. o. b. Vancouver, Washington; \$2.68 f. o. b. Chehalis.

Washington Portland-Tacoma Dredging, June 19, quoting \$2.58 per barrel f. o. b. Chehalis, \$2.30 per barrel f. o. b. Vancouver, Washington.

Exhibit No. 26. To Tum-A-Lum Lumber Co. June 7, 1916 quoting price carload lots of 50,000 pounds minimum.

Exhibit No. 27. Order J. McCracken January 1, one car Oregon Brand Cement.

Exhibit No. 28. Freight bill to McCracken, Portland.

Exhibit No. 29. To Wasco Lumber Co. June 13, 1916, [491] announcing Oregon-made cement.

Letter Ashland Lumber Co. June 10 same effect.

Exhibit No. 30. Letter from Denver to Oregon Portland *re* failure of Hollister to get any business in eastern Oregon.

Exhibit No. 31. Bill to Tum-A-Lum Lumber Company, 6/14/16.

Exhibit No. 32. Bill to Kleinschmith Hardware Company, Baker 6/17/16.

Exhibit No. 33. Bill to Tum-A-Lum Lumber Company, 6/23/16.

Exhibit No. 34. Bill to Maryhill Land Company, Maryhill, Washington, 6/23/16.

Exhibit No. 35. Bill to Murphy Wann Co., Marshfield, Ore., 6/27/16.

Exhibit No. 36. Bill to Miller Lumber Company, Bend, Oregon, 6/30/16.

Exhibit No. 37. Bill to Murphy Wann Co., 7/3/16.

Exhibit No. 38. Bill to Hunt Engineering, Gold Hill, Oregon, 7/3/16.

Exhibit No. 39. Bill to Murphy Wann Co., Marshfield, Oregon, 7/15/16.

Exhibit No. 40. Bill to Rice Bros. & Adams, Myrtle Creek, 7/17/16.

Exhibit No. 41. Bill to S. P. & S. Ry. Co., 7/19.

Exhibit No. 42. Bill to J. W. Bower, Dayton, Wash., 7/19/16.

Exhibit No. 43. Bill to W. F. King Co., Prineville, Ore., 7/19/16.

Exhibit No. 4. Bill to Miller Lumber Company, Bend, Ore., 7/25/16.

Exhibit No. 45. Bill to Arlington Lumber Co., Condon, Oregon, 7/25/16.

Exhibit No. 46. Bill to S. P. & S. Ry. Co., 7/26.  
[492]

Exhibit No. 47. Bill to Maryhill Land Co. 8/2.

Exhibit No. 48. Bill to H. J. Denn, Roseburg, Oregon 8/5.



Exhibit No. 49. Bill to Murphy Wann Co. 8/7.

Exhibit No. 50. Bill to Hunt Engineering Co. 8/7.

Exhibit No. 51. Bill to Willis R. Lebo, Aberdeen, Wash., 8/9.

Exhibit No. 52. Bill to Maryhill Land Co., 8/10.

Exhibit No. 53. Bill to S. P. & S., 8/14.

Exhibit No. 54. Bill to Stearns Chenoweth, Oakland, 8/14.

Exhibit No. 55. Bill to W. F. King, 8/14.

Exhibit No. 56. Bill to Murphy Wann Co., 8/14.

Exhibit No. 57. Bill to Bend Hardware, 8/18.

Exhibit No. 58. Bill to Tum-A-Lum Lumber Co., Walla Walla, Wash. 8/19.

Exhibit No. 59. Bill to Miller Lumber Company, Bend, Oregon 8/24.

Exhibit No. 60. Bill to J. K. Irby, Kent, Oregon, 9/4.

Exhibit No. 61. Bill to Miller Lumber Company, 9/5.

Exhibit No. 62. Bill to Nottingham & Co., 9/9.

Exhibit No. 63. Bill to Concrete Pipe Works, Vancouver, Wn. 9/11.

Exhibit No. 64. Bill to S. P. & S., 9/18.

Exhibit No. 65. Bill to W. F. King, 9/18.

Exhibit No. 66. Bill to Tum-A-Lum Lumber Company 9/18.

Exhibit No. 67. Bill to Maryhill Land Co., 9/18.

Exhibit No. 68. Bill to Arlington Lumber Co., Condon, 9/18.

Exhibit No. 69. Bill to Murphy Wann Co. 9/19.

Exhibit No. 70. Bill to Hancock, Kelso, Washington 9/21.

Exhibit No. 71. Bill to Nicholson etc. Elm, Wash. 9/25.

Exhibit No. 72. Bill to East Oregon Lumber Company, Enterprise, Oregon, 9/27.

Exhibit No. 73. Bill to Olympia Hardware Company, ([493] Olympia, Wn. 9/27.

Exhibit No. 74. Bill to Tum-A-Lum Lumber Co., 9/27.

Exhibit No. 75. Bill to Hancock, Kelso, Washington, 10/6.

Exhibit No. 76. Bill to Irby, Kent, Oregon, 10/9.

Exhibit No. 77. Bill to Maryhill Land Co., 10/10.

Exhibit No. 78. Bill to Arlington Lumber Co., Condon, 10/11.

Exhibit No. 79. Bill to Tum-A-Lum Lumber Co., 10/11.

Exhibit No. 80. Bill to Willis R. Lebo, Aberdeen, Washington 10/13.

Exhibit No. 81. Bill to Olympia Hardware, Olympia, Washington 10/14.

Exhibit No. 82. Bill to Kleinschmith Hardware Co., Baker, 10/17.

Exhibit No. 83. Bill to Pilot Rock Lumber Co., Pilot Rock, Ore. 10/18.

Exhibit No. 84. Bill to Tum-A-Lum Lumber Co., Redmond, Ore., 10/18.

Exhibit No. 85. Bill to Chehalis Material Company, Chehalis, Wash. 10/18.

Exhibit No. 86. Bill to Tum-A-Lum Lumber Co., Walla Walla, 10/18.

Exhibit No. 87. Bill to J. S. Robb, Kelso, 10/19.

Exhibit No. 88. Bill to Tum-A-Lum Lumber Co., Walla Walla, 10/19.

Exhibit No. 89. Bill to Maryhill Land Co., 10/19.

Exhibit No. 90. Enterprise M. & M. Co., Enterprise, Ore. 10/20.

Exhibit No. 91. Bill to Maryhill Land Co., 10/21.

Exhibit No. 92. Bill to East Oregon Lumber Co., Enterprise Ore. 10/24. [494]

Exhibit No. 93. Bill to Oregon Lumber Yard, Pendleton, Ore. 10/24.

Exhibit No. 94. Bill to ebo, Aberdeen, Washington, 10/27.

Exhibit No. 95. Price list, Golden Gate Cement, for California, Oregon, Washington and Nevada.

Exhibit No. 96. Letter in transfer letter book.

Exhibit No. 97. Telegram, Clark Moore to J. E. Moore, Denver:

“I have never objected to selling cement in Vancouver or anywhere else, and Hollister told me he had a sale ready to close which I supposed was done; if the price is profitable by meeting our competitors’ price, then sell all you can, but as I understand the situation we cannot get sufficient number of cars in which to load cement for Portland and other Oregon points that make us more money. Therefore, no one who really has the best interests of our company at heart would ask that we fill orders in other states that net us less money, and

neglect our own state trade. Of course we must establish an agency at Vancouver, Washington any time we can get good representation, but not place our cement for resale with some one that may prove detrimental to our interests in the future. Please show this telegram to Mr. Minor."

Exhibit No. 98. Letter to Clark Moore, Colorado Portland, Aug. 14, 1916, in which attention is called to the lack of cars, but have just secured few which will take care of rush orders, one to go to Montague O'Reilly at McMinnville.

Exhibit No. 99. Letter to Clark Moore, Aug. 24, 1916, written by J. E. M.

"From the way the cement business is showing up now, if this nice weather continues through September it is going to be a corker of a month in the cement line, and it will keep us hustling to supply the demand, but my idea in calling Hollister here is that he is doing absolutely nothing and that I [495] could use him and Wellman here and up the Valley and get hold of every bit of it I can in the next 60 days, and if we hammer them hard that time they will be more up in the air than ever, and I want to put them so high in the air they will never come down, and I think we can do it by simply taking the trade away from them."

Exhibit No. 100. Telegram J. E. Moore to Clark Moore, Denver, Sept. 16, stating sales heavy, large orders future delivery.



Exhibit No. 101. J. E. M. to Clark Moore, September 12, 1916.

“Just landed job for the Vista House, and have not missed any big work, hope our good luck continues. Car situation improved somewhat.”

Exhibit No. 102. J. E. M. to Clark Moore, Sept. 18, 1916.

“Still doing best, but that is not extra good; about at the end of our string if we can get no more cars. If we can get few cars, will ship in the city and allow country orders to go, as we think this is best plan to save our business.”

Exhibit No. 103. J. E. M. to Lebo, Aberdeen, Washington, Oct. 3, 1916, stating since September 28th have just had three box-cars in which to ship cement. Also speaks of price cutting around Aberdeen to different people in order to obtain business.

Exhibit No. 104. Letter Lebo to Oregon Portland, Oct. 13, 1916, requesting preference in time as to shipment. Answer, Oct. 14th, stating car loaded yesterday.

Exhibit No. 105. Letter J. E. M. to Clark Moore, Oct. 12, 1916, in which he complains about the car situation and states that if some arrangement not made to get cement into the city, it simply means a loss of the entire business to our competitors, and when we can get in a position to ship again [496] it will be the same as starting a new business. Decided to use auto trucks and car cement in that way even if it calls for loss of all profit.

Exhibit No. 106. Clark Moore to J. E. M., October 16th. *Re* car shortage. Explains in covering barge and shipment by auto truck. Expresses hope that daily reports will be sent.

Exhibit No. 107. To D. W. Campbell, S. P. Co., requesting cars. June 27, 1916. Letter to Hinshaw, S. P. Co. requesting cars. July 16, 1916. Letter to Hinshaw, July 22, 1916, ordering cars for Tillamook, Portland, Bend, Condon, Dallas and McMinville. To S. P. Company, July 29th, ordering cars.

Aug. 25th, ordering cars.

Sept. 4th, ordering cars.

Sept. 4th, agent, Oswego, Oregon—Please list our order 79 cars.

Sept. 9th, to Hinshaw—Had some cars but need more.

Sept. 11th, to Hinshaw—Need 52 cars at once.

Sept. 22d, to Hinshaw—Calling attention to fact that they load cars on Sunday.

Oct 13th—Requesting cars.

Oct. 14th—Must have one car for Tillamook.

Oct. 14th—From Hinshaw—referring their requests.

Exhibit No. 108. Bill to Concrete Pipe Works, Vancouver, Washington, Sept. 11, 1916.

Exhibit No. 109. Bill to McCracken, July 29, 1916.

Exhibit No. 110. Bill to McCracken, Aug. 31, 1916.

Number of bills, all dated Aug., Sept. and Oct.

Exhibit No. 111. Bill to W. F. King, Prineville, Oregon, July 19, Aug. 14, Sept. 18, 1916. Also letter Santa Cruz to W. F. King relative to price and time required to deliver. Letter May 6, 1916, to W. F. King from Santa Cruz, stating price [497] remains same.

Letter May 17th, Standard Portland to W. F. King, answering request for better price, stating inquiry had been submitted to the house direct, who are unable to make better price on account of transportation conditions.

Exhibit No. 112. Telegram August 8, 1916, Oregon Portland Cement to Grant Fee:

“Understand you are low bidder on Portland postoffice, hope we can sell Oregon brand cement. Can make prompt delivery and satisfactory price, cement best quality.”

Exhibit No. 113. Ans: August 21st requesting the quotation of price of cement delivered at job.

Exhibit No. 114. Telegram Clark Moore to J. E. Moore, August 16, 1916, Mr. Hiltz wants to see Finley about position inspection roads. Please have Finley see him.

Exhibit No. 115. Telegram Hiltz to Clark Moore, June 8, 1916, stating will leave San Francisco on Shasta arriving Portland, trust satisfactory.

Exhibit No. 116. Clark Moore to J. E. Moore, directions for reaching while on train from Oakland for Ogden.

Exhibit No. 117. Clark Moore to Hollister, July 12, 1916, gratified that cement has passed test and now on city list, also advising that Wellman might

make some eastern territory, in which he states things are breaking for us in the territory south of Portland, and believe we will have practically all of the trade in that territory.

Exhibit No. 118. Clark Moore to Hollister, July 14, [498] 1916, *re* payments to be made by McCracken, the report from McBeck on the quality of the cement, and hopes Wellman will continue after Oregon City job, anxious to hear about rate proposition.

Exhibit No. 119. Clark Moore to Hollister, May 6, 1916, want to get work for Hinkle, Teale project, watch closely. Matter of handling work Grants Pass very satisfactory. [499]

### **Order Settling Bill of Exceptions.**

Whereupon the Court having considered the foregoing bill of exceptions submitted on behalf of the defendants R. P. Butchart and Clark M. Moore, and being fully advised in regard to the same, and being now willing to preserve the record that its rulings and each of them may be reviewed for error, if any there be, now certifies that the foregoing bill of exceptions contains all of the evidence offered and admitted upon the trial of said cause together with the rulings of the Court thereon and all the evidence offered and not received in evidence under the rulings of the Court thereon and all the rulings of the Court thereon, and all of the instructions given to the jury upon the trial of said cause and also all of the instructions requested by the defendant and contains all exceptions taken and



allowed to the rulings of the Court upon evidence offered and admitted and received and upon evidence offered and excluded by the Court and also all exceptions taken and allowed to the instructions given to the jury and all exceptions taken and allowed to the rulings of the Court refusing to give instructions requested by defendants and also contains all exhibits offered and received in evidence and papers, writings and printed and written matters offered in evidence and not introduced or received in evidence under the rulings of the Court and that the said bill of exceptions conforms to the facts. It is further ordered that inasmuch as each of the defendants requested upon the trial of this cause that the Court instruct the jury to return a verdict of Not Guilty and such request was denied and said rulings duly excepted to, the bill of exceptions shall contain the charge of the Court at large to the jury as well as those portions thereof excepted to and the instructions requested and denied. The transcript of the testimony at said trial is hereto attached and is hereby adopted and made a part [500] of this bill of exceptions.

Whereupon this bill of exceptions is now here settled, certified and signed this 18th day of July, 1921, and the same is hereby directed to be filed.

R. S. BEAN,  
District Judge.

O. K.—HALL S. LUSK,

Asst. U. S. Attorney. [501]

Service of the within bill of exceptions and receipt of a copy is hereby admitted this 29th day of April, 1921.

LESTER W. HUMPHREYS,

United States Attorney.

Lodged in Clerk's office April 29, 1921.

G. H. MARSH.

Filed July 18, 1921. G. H. Marsh, Clerk. [502]

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**Plaintiff's Exhibit No. 20.**

**DAY LETTER.**

San Francisco, California, July 11, 1914.

C. W. Jones,

Riverside Portland Cement Co.

Railway Exchange Building,

Portland, Oregon.

Note your telegrams of ninth and tenth. I don't think California Mills mean to give any discount to dealers from the present price out of town dealers was not discussed but you can doubtless find out from Pacific Santa Cruz and Standard whether they are giving a discount to out of town dealers. Whatever they do we will do. If you have any out of town dealers that you consider particularly valuable protect them for any part or all of the dealers ten cents. For the time being also you may do the same with Columbia and McCracken but try to satisfy them with as much less than ten cents if possible under the circumstances.

TYLER HENSHAW.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[503]

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**Plaintiff's Exhibit No. 31.**

San Francisco, California, November 16, 1914.  
Mr. C. W. Jones,  
Portland, Oregon.

Dear Sir:

We have practically decided to drop out of the Portland market as it has not proved sufficiently satisfactory, and until you receive further notice please do not quote any prices or sell any more cement except such as we are already committed for.

Kindly let me know the amount of cement that we have on hand and what commitments we have outstanding, as we will have to make provision for them.

After receiving the above information you will be instructed as to further action in the matter.

Very truly,  
WM. G. HENSHAW, Pt.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[504]

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**Plaintiff's Exhibit No. 33.**

March 18, 1915.

Dr. A. C. Steckle,  
Battle Ground, Washington.

Dear Sir:

We have your letter of the 17th, ordering 11½

barrels of cement, and regret our inability to make the shipment, owing to the fact that we have withdrawn from this market.

Rather than delay the shipment, we took the liberty of referring your order to the Henry Cowell Lime & Cement Co., and they will make delivery via the Steamer IONE.

Thanking you for the order, and trusting our action will meet with your approval, we remain,

Yours very truly,

RIVERSIDE PORTLAND CEMENT CO.,

Agent.

Filed December 24, 1920. G. H. Marsh, Clerk. [505]

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**Plaintiff's Exhibit No. 39.**

Portland, Oregon, December 28, 1914.

Mr. F. M. Wylie,

c/o Aberdeen Manufacturing Co.,  
Aberdeen, Washington.

My dear Mr. Wylie:

This is to advise you that after the first of the year we will not be in the Washington Market with cement. Nobody regrets this more than the writer as he has made many, many friends among several of the dealers in Washington and hates to lose our identity in this material.

If, however, you have any orders on hand which you would want to send into us before January 1st, and which we could deliver during the month of January, we will gladly take care of them, but we



cannot take any orders after January 1st. Of course whatever orders you might have, or if there is anything you would want delivered during January, and the order arrived here before the 1st, we will fill it.

The writer had planned to make a trip to Aberdeen this week, but has found it impossible to get away owing to some Oregon deals which we have pending and also some lime deals in Washington.

We trust you will not forget us with your lime business and your plaster business. If it is possible within the next couple of weeks for the writer to get into Aberdeen and pay you a little visit he will gladly do so.

With very best regards, hoping that you spent a Merry Christmas and wishing you a very Happy New Year, we are,

Very truly yours,

HENRY COWELL LIME & CEMENT CO.,  
PORTLAND.

By GEO. C. MacDONALD,  
Manager.

Filed December 24, 1920. G. H. Marsh, Clerk. [506]

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**Plaintiff's Exhibit No. 40.**

February 2, 1915.

Treasury Department,  
Washington, D. C.

We, the undersigned dealers in building materials of this city, wish to report to you the predicament

we find ourselves in at the present time due to a combination made to control the sale of all cement here and also in the adjoining city of Hoquiam. This combination apparently being entered into by the following known manufacturers of cement: The Superior Portland Cement Company, The Washington Portland Cement Company, and the Olympic Portland Cement Company of this state with head offices in Seattle; The Pacific Portland Cement Company and the Henry Cowell Lime and Cement Company of California with offices at San Francisco and also the F. G. Foster Company of Hoquiam, Washington, the latter dealers in building materials.

Now this city has been supplied through the undersigned in the past with Washington and California manufactured cements. The T. B. Darragh Company selling the cement of the Pacific Portland Cement Company, The Aberdeen Manufacturing Company selling the cement of the Henry Cowell Lime & Cement Company, and the W. R. Lebo Company selling the cements of all three of the mentioned Washington Companies.

The first of the year saw the following changes here due to this combination. Cement was raised 30¢ per bbl. to the consumer, from \$1.90 to \$2.20 net. The agency held by the Lebo Company of the three Washington cements was [507] taken away from them and given to the F. G. Foster Company who then opened up a branch business here with a stock of building materials. The Pacific Portland Cement Company notified the Darragh Company that they must quote cement no cheaper than \$2.30

net, or 10¢ above the Foster Company price, which naturally eliminated the Darragh Company from securing any cement business. The Henry Cowell Lime & Cement Company wrote the Aberdeen Manufacturing Company that they had withdrawn from the Washington market and that they would ship no more cement to Aberdeen. Now this action was taken by the California companies the first of the year in spite of the fact that they could get business at a 30¢ per bbl. advance in price and a 50¢ per bbl. advance over what they received for cement here during most of the year 1914, the price then being \$1.70 net. Also, these same California companies are to-day shipping cement into Portland, Oregon, at a higher freight cost from San Francisco than the freight cost is to Aberdeen and receiving for this cement in Portland 30¢ per bbl. less than they can get for it in Aberdeen, under the present prevailing market price.

This combination is going to work a great hardship upon us for the following reasons: We deal in all kinds of building materials, and as most orders in a city the size of Aberdeen are mixed orders, consisting of cement, lime, brick, etc., etc., a buyer in nearly every instance wants his requirements from one place and as cement is usually the chief item, this combination is going to stifle competition and give the Foster Company a leverage that must soon draw the bulk of the building material business to them, to the demoralization and perhaps ruin of our business. [508]

Now this combination must certainly be illegal, and we are therefore writing you and requesting

that your Department investigate this matter and if possible get relief for us.

Yours very truly,  
ABERDEEN MANUFACTURING CO.,  
\_\_\_\_\_,  
Mgr.  
W. R. LEBO & COMPANY,  
\_\_\_\_\_,  
Mgr.  
T. B. DARRAGH COMPANY,  
\_\_\_\_\_,  
Mgr.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[509]

\_\_\_\_\_  
**Plaintiff's Exhibit No. 45.**

Vancouver, Washington, August 9, 1916.  
Superior Portland Cement Co.,  
Seattle, Washington.

Dear Sirs:

We wired you for a car of cement for the Camas job but ship to Vancouver and we will divert it.

The contractor made arrangements with E. & L. at Portland to test it and they said that they now had a man at Concrete to attend to it.

Pac. Br. Co.

Saw Mr. Swigert yesterday and he said that he would give you more cement business when he moved across to this side.

The enclosed card was left today and the gent said that he was on his way to cover the territory as far as Olympia.



Just noticed that the stationery was printed double but it is too late to turn back now.

Very truly yours,

GUY BENNETT.

Kindly say when can ship above cement. [510]

PLAINTIFF'S EXHIBIT No. 45—Cont'd.

August 11, 1916.

Bennett Hardware Company,  
Vancouver, Washington.

Gentlemen:

We are in receipt of your favor of the 9th and note that the Pacific Bridge Company will give us the cement used on this side of the river. We thank you for this information, and also the card of Mr. Hollisley, representative of the Oswego plant. We do not know Mr. Hollisley's object in visiting this territory, but no doubt will find out later on.

The car of 150 barrels left the factory this morning. Edwards & Lazelle now have a man at Concrete who has taken samples on this car.

Yours very truly,

SUPERIOR PORTLAND CEMENT COMPANY,

By \_\_\_\_\_,

Sales Manager.

Filed December 24, 1920. G. H. Marsh, Clerk. .  
[511]

**Plaintiff's Exhibit No. 50.**

Tacoma, Washington, April 10, 1914.

Mr. F. R. Muhs,

Care Santa Cruz Portland Cement Company,  
Crocker Building, San Francisco, California.

My dear Muhs,—

I wired you Wednesday night giving prices on which bids were made to King County Commissioners.

Since then I understand quotations have been made at \$1.55 f. o. b. Charleston, which you probably know is across the Bay near Bremerton; delivered price of \$1.65 has been made by Galbraith, Bacon to 2d and Madison and similar price by "Olympic" to a job a little farther away from the dock. On these two the cartage could not be less than eight cents, so that you can figure the dock price.

I believe the California mills are in error in not putting at least some cement into the Sound markets, for when the present scrap between "Washington" and "Olympic" is over and they again decide to put prices to a legitimate figure, the California mills will not be considered, as both the Washington mills will say that this is their own personal fight; that California had nothing to do with prices except to quote with no intention of delivering; that you have never done anything but "bluff" in this market, and you will probably be requested to keep out of the Oregon market, under

the penalty of having the San Francisco market invaded.

I think it is generally their impression, judging by your past performance, that you are more or less afraid of them. Whether they can disturb your San Francisco market or not cuts no figure, if they think they can. They have already made the threat, which I honestly believe they [512] intend to make good, that any actual delivery and sale made by California cement in the Seattle market will mean an immediate shipment of Washington cement to San Francisco, and offer of same at your Seattle price in the San Francisco market, and I believe they are fully prepared to make the experiment.

If this is true, they will undoubtedly invite you to stay out of Oregon under the same penalty.

You may consider that so long as they are fighting up here, they will eventually tire themselves out and give you an opportunity to offer your good offices as peacemaker, but I assure you that peace will not be considered except on a basis that will give at least a certain portion of the Oregon market to the Washington mills. The three-year contract with Mr. Nickerson is almost a proof of my statement.

Of course if you are willing to concede Oregon as you conceded or were driven out of Washington, then my reasoning as above amounts to nothing. However, if you wish to maintain your status in Oregon, you will have to become a party to the

scrap here, so that in the final windup, you also can be considered.

Very truly yours,

W. E. HACKEN.

WEH/C.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[513]

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**Plaintiff's Exhibit No. 51.**

Seattle, Washington, June 1, 1914.

F. T. Crowe & Co.,

1005 A St., Tacoma, Washington.

Attention Mr. Pierce:

Gentlemen:

With reference to our telephone conversation this afternoon, we have ordered shipped for the use of the Northern Pacific Railway Co. 331 barrels, in two cars containing 165 and 166, respectively.

The last car of 231 shipped on the other order we have instructed the Factory to rearrange the price on, charging it at \$1.50 f. o. b. Tacoma, instead of \$1.10 f. o. b. Concrete.

Referring to the order for Gray at Payallup, and the one for the Olympic Hardware at Olympia, these we will charge to you at \$1.20 net, f. o. b. Concrete, instead of \$1.10, as I told you over the 'phone; \$1.10 is a railway price.

We have some hopes of getting price matters straightened out in the next few days, and we will get down then to some sort of a basis so that we



will have some idea of what the price of cement really is.

Yours very truly,  
SUPERIOR PORTLAND CEMENT CO.,  
A. A. SUTHERLAND,  
Sales Manager.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[514]

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**Plaintiff's Exhibit No. 52.**

Tacoma, Washington, July 2, 1914.

Fred R. Muhs, Esq.,  
San Francisco, California.

My dear Fred:

I found your wire of the 30th on my desk this morning when on return from a trip to Victoria in connection with our Pipe contract there, and am very sorry not to have had the chance to get down to see you, as there were a lot of matters I wanted to discuss with you. Have put in a call on phone hoping at least to have a word with you.

Cement matters here are progressing slowly. I think both Coats and Baillie are tired and would like to be good but the former especially is suspicious and ready to start all over again if anything happened that he did not like, also in Portland he has a man who will use any excuse to stir things up as an open market with a chance to make little cuts are just what he needs. The same is true in Seattle where G. B. & Co. are jealous of

anybody else getting any business, and when they lose insist that it is because of a cut.

Mr. Crowe will be going south within a few days with Mr. Hirsh of the N. Y. end of the Pipe business and will undoubtedly see you in the City.

WEH/

Yours very truly,

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Filed December 24, 1920. G. H. Marsh, Clerk.  
[515]

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**Plaintiff's Exhibit No. 55.**

Tacoma, Washington, July 23, 1914.

Mr. Fred R. Muhs,

San Francisco, California,

My dear Fred:

I have your night letter of yesterday, and I am absolutely certain that your fears are groundless. Acting to that letter of what I understand your instructions to be, we have been selling cement for day to day delivery at \$1.50 and for future contracts on work secured and for delivery before the first of the year at \$1.70, and for anything running over the first \$1.90. I am sending Portland a copy of this letter with the request that if the above statement is not correct in every particular to promptly advise me. On the contrary to your accusation or fears while we are acting as above I understand that the agent for the Standard is quoting for delivery that will not be required for thirty days a price of \$1.50 and that Cowell agency is offering at \$1.50 to a man

who has no job at present, advising that if cement is not taken within a specified time that his note will be taken and carried, so that all the way up or down we seem to be the goats.

The people in this state have finally seen some wisdom and I think that matters are in better shape than ever before in the history of the business. Prices in Seattle, Tacoma and Portland are \$1.90 FIRM, and if they will adopt a little policy as I outlined to them the other day feel certain that it will stick.

Yours as always,

Filed December 24, 1920. G. H. Marsh, Clerk.  
[516]

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**Plaintiff's Exhibit No. 56.**

Seattle, August 27, 1914.

F. T. Crowe & Co.,  
1005 A St., Tacoma, Washington.  
Tacoma, Washington.

Attention of Mr. Hacker:

Gentlemen:

Referring to our telephone conversation of this morning, in the matter of bids for the 300 barrels required by the State Training School at Chehalis, it was agreed among ourselves that this order should come to us. We are consequently putting in a bid of \$1.85½, the same as we did last time, the Washington, \$1.87½, and Balfour, Guthrie \$1.90. We would prefer that you do not bid on this at all.

but if you do, kindly bid slightly above us, and oblige.

Yours very truly,  
SUPERIOR PORTLAND CEMENT CO.,  
A. A. SUTHERLAND,  
Sales Manager.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[517]

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**Plaintiff's Exhibit No. 57.**

Seattle, January 12, 1915.

F. T. Crowe & Co.,  
1005 A St., Tacoma, Washington.

Gentlemen:

It is our wish and decision that you confine your sales of SUPERIOR PORTLAND CEMENT to the city of Tacoma, as it is our intention to appoint agents in Centralia, Chehalis, Olympia, Sumner, Puyallup, and all outside points formerly covered by your office. Both other factories are adopting the same policy.

Yours very truly,  
SUPERIOR PORTLAND CEMENT CO.,  
A. A. SUTHERLAND,  
Sales Manager.

Seattle, December 31, 1914.

F. T. Crowe & Co.,  
Globe Building,  
Seattle.

Gentlemen:

Please be advised that effective to-morrow, Janu-



ary 1, 1915, the price of cement to dealers will be \$1.90 net. No commissions allowed from this price. We also reserve the right to sell direct in carload lots.

Yours very truly,  
SUPERIOR PORTLAND CEMENT CO.,  
A. A. SUTHERLAND,  
Sales Manager.

AAS\*T. [518]

PLAINTIFF'S EXHIBIT No. 57—Cont'd.

Seattle, Washington, December 31, 1914.

Messrs. F. T. Crowe & Co.,

Seattle, Washington.

Dear Sirs:

Please note that on and after this date our prices to you on "Olympic" cement will be \$1.90 per barrel net f. o. b. Seattle in carloads, without any commission allowance; sacks extra, as usual, and terms of payment as formerly.

Yours faithfully,  
BALFOUR, GUTHRIE & CO.,  
Agents.

W. C. CAMERON.

Seattle, Washington, January 4, 1915.

Messrs. F. T. Crowe & Co.,

Seattle, Washington.

Dear Sirs:

We have yours of 2d inst., and the program as you outline is exactly the one we propose to follow, i. e., we reserve the right to sell in carloads only at \$1.90 net to any consumer who will buy this

quantity, and the less than carload business will therefore be left to dealers like yourselves to take care of.

Yours very truly,  
BALFOUR, GUTHRIE & CO.,  
Agents.  
W. C. CAMERON. [519]

PLAINTIFF'S EXHIBIT No. 57—Cont'd.

Seattle, Washington, January 2, 1915.

Messrs. Olympic Portland Cement Co.,

Seattle, Washington.

Attention Mr. Cameron.

Gentlemen:

We have your favor of the 31st inst. and it seems to us that an explanation is due us, other than this bare notice of \$1.90 net price. We would like to know what your action is going to be in relation to selling contractors direct, at the same price, and if you propose to go right after contractors. In case you go after contractors and sell them direct, we think it is only right for dealers, both large and small, that the cement companies should only sell contractors full carloads right on the track, direct shipment from the mill and that any and all, less than carload business, and also the shipments out of warehouse should be taken care of by the dealers.

Very truly yours,

F. T. CROWE & CO.

FTC.S.

Seattle, Washington, February 23, 1915.

F. T. Crowe & Co.,  
Globe Building,  
Seattle.

Gentlemen:

Please be advised that all sales of cement during any calendar month are due and payable on the tenth day of the following month. There are no exceptions to this [520] rule to anybody, and no Plaintiff's Exhibit No. 57.

favors shown, with the exception of sales made direct by the manufacturers to such as the Port Commission, or any other municipal corporation, where the bid distinctly calls for payment on certain dates.

Please bear this in mind, as it is our intention to absolutely live up to it.

Yours very truly,  
SUPERIOR PORTLAND CEMENT CO.,  
A. A. SUTHERLAND,  
Treasurer.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[521]

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**Plaintiff's Exhibit No. 59.**

October 5th, 1914.

Balfour, Guthrie & Co.,  
Portland, Oregon.

Gentlemen:

We hand you herewith letter from Mr. W. C. Hall, at Eugene, and copy of our reply to him. We

leave it entirely in your hands as to whether or not to put Superior Portland Cement in there or not. My understanding of the arrangement with the California companies in Oregon is that the Washington companies, after the first of the year, should stay north of Salem. I wish you would let me know if my understanding of this is right.

Yours very truly,

SUPERIOR PORTLAND CEMENT CO.,

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Sales Manager.

2 enc.

AAS\*T.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[522]

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**Plaintiff's Exhibit No. 61.**

June 11, 1914.

Mr. C. W. Gamble, General Manager,  
St. Paul & Tacoma Lumber Co.,  
North Yakima, Washington.

Dear Sir:

Confirming our telephone conversation of this afternoon, I am willing to take a car or two at \$1.85 net to us, f. o. b. cars North Yakima. If any large order comes up for immediate use, you might take it up with us, and see what we will be willing to do.

At the present time we have advanced prices here 20¢, and expect to get an organization completed in the near future, and boost it a little more. After



this is done, we may try to induce the Spokane plants to get together, but it looks like a hopeless thing over there.

Yours very truly,

SUPERIOR PORTLAND CEMENT CO.,

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Sales Manager.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[523]

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**Plaintiff's Exhibit No. 62.**

Seattle, August 21, 1914.

F. G. Foster Co.,

Hoquiam, Washington.

Gentlemen:

Please be advised that under mutual agreement between ourselves and the Washington Portland Cement Co., you are to represent Superior Portland Cement in the town of Hoquaim.

The writer some little time ago sent a car in to Willis R. Lebo & Co., before the understanding was reached. We are, however, cancelling this arrangement, and enclose herewith copy of letter written to-day to Willis R. Lebo & Co.

We would be glad to receive instructions to send in a car of SUPERIOR at an early date.

We are sending you under separate cover by parcel post a few of our memorandum books.

Yours very truly,

SUPERIOR PORTLAND CEMENT CO.,

A. A. SUTHERLAND,

Sales Manager.

Seattle, Washington, August 21, 1914.

Willis R. Lebo & Co.,

Hoquiam, Washington.

Gentlemen:

Owing to developments in Hoquiam, we find it necessary to place the sale of our cement in the hands of the F. G. Foster Co., of your city. Your contract, as you know, only covers the City of Aberdeen.

Yours very truly,

SUPERIOR PORTLAND CEMENT CO.,

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Sales Manager.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[524]

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**Plaintiff's Exhibit No. 68.**

**TELEGRAM.**

Seattle, January 4, 1915.

George T. Cameron,

Crocker Building,

San Francisco, California.

Quote Blue Cross cement Will take shipments immediately if price satisfactory Coates has ditched us.

**GALBRAITH, BACON & CO.**

CHB/S 10:02

San Francisco, California, January 4, 1915.

Galbraith, Bacon & Co.,

Seattle, Washington.

Our absence from Seattle market for several

years has put us out of touch with conditions there. Mr. Muhs or myself will be in Portland within two weeks and will take up this matter with you at that time Will do nothing until we see you.

6:27 PM.

GEO. T. CAMERON.

January 6, 1915.

Mr. George T. Cameron,  
Crocker Building,  
San Francisco, California.

Dear Sir:

We acknowledge receipt of your message of the 4th, which reached us yesterday morning, from which we note that either Mr. Muhs or myself will be in Portland within two weeks. We should like very much to take up the cement question with you at that time or before. The facts are as stated in our message and we are open to make some arrangement for continuing in the cement business.

Your message states that you will do [525]

PLAINTIFF'S EXHIBIT No. 68.—Cont'd.

nothing until you see us so we should like very much to go into the subject with you thoroughly at the first convenient opportunity.

Yours truly,

GALBRAITH, BACON & CO.,

CHB/S.

Per C. H. BACON.

San Francisco, California, January 12, 1915.  
Messrs. Galbraith, Bacon & Co.,  
Foot of Madison Street,  
Seattle, Washington.

Gentlemen:

Replying to your favor of January 6th, I find that I will not be able to be in Portland on that date and I have asked Mr. Muhs if he can arrange to do so, to see you or communicate with you with reference to our marketing cement in Seattle.

We have opened our own offices for direct selling in Oregon and we will handle our Washington business from that office. It will not be possible, under these circumstances, for you to handle our cement in Seattle under our present arrangement for selling our product.

Yours very truly,

GEO. T. CAMERON. [526]

PLAINTIFF'S EXHIBIT No. 68.—Cont'd.

DAY LETTER.

Seattle, Washington, March 6, 1915.

Geo. T. Cameron,

San Francisco, California.

Can sell Port Commission for your account twenty thousand barrels Blue Cross deliveries over next six months two dollars per barrel you pay wharfage handling and storage twenty five cents per barrel and freight on return bags Would net you one seventy five ships slings Seattle Please



keep confidential Simply decline if not interested  
but dont spill the beans.

GALBRAITH, BACON & CO.  
TELEGRAM.

San Francisco, California, March 8, 1918.

Galbraith, Bacon & Co.,

Foot of Madison Street,

Seattle, Washington.

Offer declined. Many thanks.

GEO. T. CAMERON.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[527]

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**Plaintiff's Exhibit No. 70.**

San Francisco, California, February 21, 1916.

Attention Mr. Bacon.

Galbraith, Bacon & Co.,

Seattle, Washington.

Gentlemen:

Yours of the 15th arrived on the 18th during  
the writer's absence at the Mill.

We will not be able to accept your order for  
2000 barrels of Mount Diablo Cement on the con-  
ditions stated on the face of your order.

On January 22d we wired you as follows:  
"Effective this morning make price Mount Diablo  
Cement Two Dollars Forty Five cents per barrel  
dock Seattle including bags. Allow seven one half  
cents for each bag returned good order."

At this price can make shipment as soon as  
steamship space can be secured. Kindly advise.

At this time it will not be possible for us to make you the quotation asked for on the proposed business of the Port Commission.

Yours very truly,

WHG-W.

W. H. GEORGE,

cc-AEK.

Secretary.

GCM.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[528]

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**Plaintiff's Exhibit No. 72.**

TELEGRAM.

Seattle, June 6, 1916.

Oregon Portland Cement Co.,

1104 Wilcox Building,

Portland, Oregon.

Can you supply us with cement now If so quote price five thousand barrels Shipments to start at once at rate of say three cars per week. Wire answer.

GALBRAITH, BACON & CO.

CHB/S 2:05

TELEGRAM.

Portland, Ore. June 6, 1916.

Galbraith Bacon & Co.,

Seattle.

Quote you Oregon Portland Cement two dollars sixty eight cents barrel including sacks fob Seattle in carloads. Dealers discount ten cents barrel.

OREGON PORTLAND CEMENT CO.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[529]

**Plaintiff's Exhibit No. 73.**

June 7, 1916.

Oregon Portland Cement Co.,

Portland, Oregon.

Gentlemen:

We acknowledge receipt of your telegram today quoting cement at \$2.68 including sacks fob cars Seattle. This price is too high for us as we are doing better from the local dealers. If there is any change in the near future which will enable you to lower the price, we will be glad if you will keep us in mind and let us hear from you.

Thanking you for your prompt reply to our inquiry, we are,

Yours truly,

GALBRAITH, BACON & CO.,

Per \_\_\_\_\_.

CHB/S.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[530]

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**Plaintiff's Exhibit No. 74.**

April 18, 1916.

Dear Will:

Was mighty sorry on my visit to San Francisco last week not to have had time to have a few minutes talk with you, not only to speak about the Association, but to thank you personally for the wonderful party you gave us in San Francisco when I was there about two months ago.

Regarding the Association matters, I think your objection to any contribution in excess of  $\frac{1}{4}\text{¢}$  per barrel was the same as my own, viz.,—that too much of the  $\frac{3}{4}\text{¢}$  voted at the Association meeting in New York last December was to be divided to national advertising and to other uses that were of very doubtful value in our particular section of the country. I sincerely hope that you will be in accord with what all of those present at the meeting with Mr. Beck in San Francisco last week agreed to do. So far as the Northwest is concerned, I am positive that the spending of 80% of the  $\frac{3}{4}\text{¢}$  per barrel contribution will be a very good investment, and will enable us to reduce a good share of the direct expense we have been put to in each individual company attempting its promotion work.

I don't know whether you formed as favorable an impression of Mr. Beck as I did, but he certainly strikes me as being the right man in the right place, and I hope that you will join the rest of us in lending him your heartiest co-operation.

With kindest regards, and hoping that I may see you again in a short time, I am,

Yours truly,

Mr. W. H. George,

2 Market Street, San Francisco, Cal. [531]



HENRY COWELL LIME AND CEMENT CO.

2 Market Street, San Francisco, Cal.

Apr. 24, 1916.

Attention Mr. J. C. Eden.

Superior Portland Cement Co.,

Seattle, Washington.

My dear Jack:

Replying to yours of April 18th, beg to advise that on April 20th I wired Mr. Beck as follows:

“We will stay with the Association under new plan until October 1st, the date when the year that we joined for is up.

Will then consider the matter again. Am afraid local competitors will not stop private promotion.”

At first I was not sure about Beck, but the more I saw him the more I like him and am willing to play the string out for the term of our enlistment of one year, from October 1, 1915, to October 1, 1916.

Altogether I am free to confess that I am not quite sure as to the advisability of all this. I feel as tho a company like our own could probably to better advantage as far as its own interests were concerned, do its own promotion work, but I do realize that this looks like a selfish position, because if the others were all in the Association, promoting the Association work, we of course get some measure of benefit. This, at this time, is the real reason that keeps our company in the Association, with the further hope that during the balance of the time that we are in, that things will develop so

that all hands will see the advisability of a Coast Association, as I thoroughly believe in this.

I hope before long to have an opportunity to discuss all of this personally with you.

Yours very truly,

WHG-w.

W. H. GEORGE,

Secretary.

Filed Dec. 24, 1920. G. H. Marsh, Clerk. [532]

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**Plaintiff's Exhibit No. 75.**

**WESTERN UNION NIGHT LETTER.**

San Francisco, California, Mch. 8, 1915.

Mr. J. C. Eden,

Superior Portland Cement Co. Hoge Bldg.

Seattle, Washington.

Understand Spokane mills have applied for thirteen and half cent rate in Portland territory and at present are trying to round up bunch of contractors controlling considerable quantity of cement and arrange a deal with them Can you get any information regarding possibility of their securing rate from railroad people Please advise fully by wire can we do anything in matter.

F. R. MUHS.

TELEGRAM.

3/9/15.

F. R. Muhs,

Crocker Building,

San Francisco, California.

Eden and Coats in Portland since Sunday night

Had Oregon Washington fixed when North Bank  
butted in declaring thirteen and half cent rate  
Working on them today Great Northern officials  
here protesting strongly against North Bank re-  
duction Expect to hold old rate in force.

Paid charge

SUPERIOR PORTLAND CEMENT CO.

TELEGRAM.

St. Paul, Minn. March 9, 1915.

John C. Eden,

Care Benson Hotel,

Portland, Oregon.

Yours eighth have just wired Skinner strong  
protest against publication reduced rate on cement  
Spokane to Portland.

W. P. KENNEY

8:40 AM

TELEGRAM.

San Francisco, Cal. Mar. 12, 1915.

Mr. J. C. Eden,

Superior Portland Cement Co.

Hoge Bldg., Seattle, Wash.

Please wire night letter latest developments  
Spokane to Portland rate.

FRED R. MUHS. [533]

PLAINTIFF'S EXHIBIT No. 75.—Cont'd.

TELEGRAM.

F. R. Muhs,

3/13/15.

Crocker Building,

San Francisco, California.

Final decision Spokane Portland rate held up for  
ten days from eleventh Meantime Coats is going

to St Paul and I will probably leave on Shasta in morning for conference with Louis Hill at Del Monte calling on you Tuesday morning.

Paid.

JNO. C. EDEN.

TELEGRAM.

3/13/15.

A F Coats,

St. Paul Hotel,

St. Paul, Minn.

Have had Calkins wire Kinney and Woodworth good strong telegram If you see telegram dont be alarmed because it is in our interest Am leaving for Del Monte in the morning to see Hill Wire me care St. Francis Hotel what you accomplish there Engstrom wiring Whitson about balance Sears Roebuck Contract He doesnt want to take any action without authority Wish you would tell Whitson to draw from us.

JNO. C. EDEN.

DAY LETTER.

Chicago, Ill. 3/13/1915.

Collect.

John C. Eden,

Seattle, Washington.

Proposition did not come from our side Think it is mistake Dont understand any action yet taken and may not be Suggest you see Skinner.

J. G. WOODWORTH.



TELEGRAM.

3/13/1915.

J. C. Eden,  
St. Francis Hotel,  
San Francisco, California.

Kenny working fine and thinks he can put it  
over Skinner sore but we can best him to it  
Leaving for home tomorrow arriving [534]

PLAINTIFF'S EXHIBIT No. 75.—Cont'd.  
Saturday night Think we had better meet Sunday  
morning in my office If you want to wire me on  
Great Northern train.

A. F. COATS.

CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY CO.  
Traffic Manager.

Seattle, Washington, March 17, 1915.  
File A-19071.

Mr. J. C. Eden, President  
Superior Portland Cement Co.,  
Seattle, Washington.

My Dear Mr. Eden:

I have very favorable replies from both Mr.  
Woodworth and Mr. Kenney in regard to the  
cement rate. They are going to very vigorously  
protest against any reduction in the Irwin-Port-  
land rate.

Yours very truly,

R. M. CALKINS,  
Traffic Manager.

RMC-S.

TELEGRAM.

San Francisco, Cal. March 18, 1915.

Collect.

A. A. Sutherland,  
Hoge Building,  
Seattle, Washington.

Hill has sent strong wires to Gilman Woodworth and Kinney and am quite sure we will beat them out Will leave here either tonight or tomorrow morning Please tell Mrs. Eden.

J. C. EDEN.

DAY LETTER.

3/22/15.

Alex Baillie,  
Del Monte Hotel,  
Del Monte, California.

Please see Louis Hill immediately Telegram from Kinney indicates rate will be published immediately Unless we can satisfy Irvin impossible to do anything in way of satisfying him except to permit [535] shipment of cement and de-

PLAINTIFF'S EXHIBIT No. 75.—Cont'd.  
liveries will extend over at least year It is unnecessary to tell you what effect of this will be on market Wired Hill yesterday requesting that he issue positive instructions and hope that you can persuade him to do this Please answer quickly as possible.

Paid-Charge.

JNO. C. EDEN.

TELEGRAM.

March 28, 1915.

John C. Eden,

Seattle, Washington.

Am going north Shasta tomorrow and would stay over as you suggest but am satisfied Louis Hill will not consent to permit Skinner publish rate I stated case very strongly to him before leaving Del Monte and I will send Kinney strong protest by wire tomorrow St. Francis.

BAILLIE.

TELEGRAM.

4 1 15.

W. P. Kinney,

St. Francis Hotel,

San Francisco, California.

Please wire if anything definite has been decided on.

JNO. C. EDEN.

Paid-Charge.

April 26, 1915.

Personal.

My Dear Jim:

You may perhaps recall that about two years and a half ago a conference was held between the cement companies of Washington and the representatives of the railroads to agree upon a rate adjustment as between the Coast mills and those of the interior. At that conference an adjustment was reached, and it was understood that no changes were to be made without another conference.

Notwithstanding this, the North Bank Railroad [536] recently agreed to publish a  $13\frac{1}{2}\text{¢}$  rate from

PLAINTIFF'S EXHIBIT No. 75—Cont'd.

Spokane to Portland, and still more recently your people have issued supplements to tariffs 2168-B and 1803-B, reducing the rates from Metaline and Irvine to points between Tacoma and Portland, and I understand will publish another supplement making reductions in rates to all the Grays Harbor territory.

Generally speaking, I think that the rates on a commodity of this kind should not be disturbed without giving all interests a chance to be heard. The only thing that the publication of the rates that your Company have just published will be to force the Coast mills to reduce the price in the territory affected by the reductions, and I don't believe that you would care to have your Company put in the position of being a price regulator of cement or any other commodity at stations along your line.

I might say the only business that has developed since the issuance of the tariffs above mentioned has been 2,000 barrels at Chehalis, on which the price was cut by the Metaline plant  $14\text{¢}$  a barrel. The business won't move from Metaline because the price was of course met by one of the Coast Mills. I might say for your information, too, that of the five members composing the pool which purchased 61,000 barrels of cement from the International Co. of Spokane, three of them are already drawing their supply from their former connections, and have



utterly ignored their agreement with the Pacific Bridge Co., and Mr. Skinner that they would not purchase their cement from any other manufacturer except the International, or some mill to whom they might assign their contracts, no matter what price was made. I haven't any doubt but what if a figure was [537] named by any of the

PLAINTIFF'S EXHIBIT No. 75—Cont'd.

north coast mills or the California plants, that the other two would ignore their agreement.

I predicted to Mr. Skinner and to Mr. Gilman that no matter how strong an agreement they might have with the pool, the lower price made by the Coast mills would take the business, and this is exactly what happened, so that you are merely in the position of taking it out of our hide, and giving it to the consumer, without creating any traffic for your railroad.

Yours truly,

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President.

JCE\*T.

Mr. John C. Eden, President,  
C/o Northern Pacific Railway Co.,  
St. Paul, Minn.

Personal.

St. Paul, Minn., May 7, 1915.

Mr. John C. Eden, President.  
Superior Portland Cement Co.,  
804 Hoge Building, Seattle, Washington.

Dear Jack:

I returned from New York this morning and find your letter dated April 26.

I fully agree in all you say about the necessity of a good understanding between the carriers and complete observance of the "Golden Rule" in connection with the handling of cement rates; nor has the Northern Pacific done or suggested anything contrary to the policy which prompted the conference at Spokane and which has governed our subsequent actions.

I have heard a lot about the Spokane-Portland rate but I don't think you ought to speak of it as a North Bank [538] proposition, when,

PLAINTIFF'S EXHIBIT No. 75—Cont'd.

as you know, the rate was originally suggested by the O. W. R. & N. Co. when they were obligated just as much as anybody, to preserve the adjustment which all lines had voluntarily and individually agreed to make. I was sorry Skinner did not communicate with St. Paul before he got into the game but have never felt like criticising his action because it was within his authority and he might have been criticised had he failed to act.

So far as the rates to our Tacoma Division points are concerned, we have made no changes which were not forced upon us by C. M. & St. P.; you may say that it was unnecessary for us to meet their rates at Centralia and Chehalis, thus involving intermediate points via Tacoma, also via the alternate route in connection with S. P. & S., and I will agree with you that we will do no business under these tariffs but our failure to make such equalization would be severely punished, and if you don't know

how that game is played I will explain it to you when I meet you in Seattle week after next.

It might be a good plan to have another meeting to discuss cement rates, although it will probably do just about as much good if you and a few others will spread the gospel a little among the railroadmen reminding them of the things which are sure to happen as the result of carelessness in these matters.

We do not make as many breaks as we did in former days, but there are enough of them to make a man feel at times that there are some things which might be said in favor of government ownership and operation of railroads.

I hope you are well and happy. At this moment I am neither well or happy but I hope to realize both of these conditions after I have had a few days of home cooking and a chance to sleep ashore.

Very truly yours,

J. G. WOODWORTH.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[539]

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**Plaintiff's Exhibit No. 76.**

March 25, 1916.

Mr. Amon Moore, Vice-President,  
Oregon Portland Cement Company,  
Oswego, Oregon.

Dear Sir:

I have your letter of the 15th instant and copy of your very interesting letter to Mr. Dieck, Com-

missioner of Public Works for the City of Portland. We shall be very glad to give you any information we possess in connection with your fight against the black base people, but inasmuch as we will probably not participate in the cement tonnage of the State of Oregon, we cannot see our way clear to assume any part of the expense of the promotion work. The Northern plants, without any assistance whatever from the California plants, spent about \$6000 in the campaign we made in Multnomah County about a year ago, besides making an extremely low price on the cement used in the roads that were constructed of concrete.

However, as I stated above, if there is any information we can give you, we will gladly do so, and will be very glad to instruct Mr. Reitze, our engineer, to answer any questions you might put to him. I think that the three companies who participate in the payment of his salary would not object to his going to Portland in an emergency and giving you the benefit of his experience.

Yours truly,

---

President.

JCE\*T.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[540]



**Plaintiff's Exhibit No. 78.**

August 4, 1916.

Washington-Portland Cement Co.

Olympic -Portland Cement Co.

Superior -Portland Cement Co.

Gentlemen:

Through our representative in Aberdeen, we have taken the following orders for cement:

Olympic Paving Company ....3,000 bbls.

Hegg & Haukili .....3,000 bbls.

covering specified improvements, at \$2.50 f. o. b. Aberdeen, sax returnable at ten cents each. We trust that this will meet with your approval, and that an equitable distribution between the three cement companies will be made.

I might say in this connection, that these prices were based upon a telephone message from the Washington-Portland Cement Company, but which were afterwards withdrawn by Mr. Pooler, naming a price of \$2.58 gross instead of \$2.50. The orders, however, had already been taken.

Further, I might add, that the new price of \$2.50 was given to the contractor on the new Postoffice Building at Aberdeen by your Mr. Geary, and it would look to me as tho that price would have to be confirmed by the manufacturers. However, we ourselves, are in no way involved, and will hold the future price to \$2.58 until further advised.

In the future all shipments going to Aberdeen, we wish you would invoice R. O. Gentry, who will

pay for the same. The Foster Company will guarantee against any loss.

Yours very truly,  
F. G. FOSTER COMPANY,  
By \_\_\_\_\_,  
Manager.

FGF-MB. [541]

PLAINTIFF'S EXHIBIT No. 78—Cont'd.

Seattle, Washington, August 18, 1916.

Messrs. F. G. Foster Co.,

Hoquiam, Washington.

Dear Sirs:

Your favor of 4th inst. was duly received, and it would have been replied to ere this but for the absence of the writer.

We note the orders for cement you took at the price of \$2.50 gross f. o. b. Aberdeen, and, of course, there is nothing else for the Cement Companies to do but take care of you on this business. In due course, we shall be glad to ship what share of it you may send us, and you will, of course, be holding for all new business, from now on, at the new price of \$2.58 in carloads, which we instructed you to quote in ours of 3d inst.

We note your instructions, in the case of shipments to Aberdeen in future, to invoice to R. O. Gentry, and this will have our attention.

In the case of any orders you may send us to apply on the Contracts you have sold at \$2.50 gross,

if you will so advise us at the time, we will invoice accordingly.

Yours faithfully,  
BALFOUR, GUTHRIE & CO.,  
Agents.  
W. R. CAMERON.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[542]

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**Plaintiff's Exhibit No. 79.**

THE OLYMPIC PORTLAND CEMENT CO., Ltd.

Head Office, London, England.

Works at Bellingham, Washington.

Seattle, Wash., September 21, 1914.

Messrs. F. G. Foster, Co.,

Hoquiam, Wash.

Dear Sirs:

We are in receipt of your favor of the 18th inst., and note carefully all you write.

So far as supplying present running contracts at \$1.60 is concerned, we could have had Pugh & Arenz' order at this figure had we wanted it, but we did not want to take it on for the very reason that you give, namely, their not taking proper care of payments on some other sales we had made them. In regard to the Grays Harbor Construction Co.'s business, as you know, Mr. Coats has always had the preference on their orders, and we had not figured that anything but "Washington" brand would be used by this concern.

It is our idea that you handle our cement in Hoquiam on the same basis as you do the "Washington" and give us a fair share of the tonnage going in your market.

Yours faithfully,  
BALFOUR, GUTHRIE & CO.,  
Agents.

W. P. CAMERON. [543]

September 18th, 1914.

Olympic Portland Cement Co.,

Seattle, Washington.

Gentlemen:

We wired you this A. M. to hold shipment of car of cement pending arrival of letter. In connection with same, would say, that in taking this matter up with your Mr. Rowland yesterday, it was with the understanding that this was to apply upon our contract, which we are still furnishing at \$1.60 f. o. b. Hoquiam. We presume that you are fully conversant with those contracts.

The contracts which we now have in force are with the Grays Harbor Construction Company and Pugh & Arenz. This car was for Pugh & Arenz. The main reason, however, for holding it up was the fact that our bills are not being properly taken care of, and we do not care to continue furnishing them on such a basis, unless they place themselves in position to take care of our account when due.

We are anxious to have your cement trade down here, and I took it from Mr. Coats that we were expected to represent the three cement companies in Hoquiam territory, but nothing was put up to



us as to just what distribution of the orders should be made. Would like to have you put us wise in the matter.

Yours very truly,  
F. G. FOSTER COMPANY.

By \_\_\_\_\_,  
Manager.

FGF''MB.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[544]

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**Plaintiff's Exhibit No. 80.**

AUBURN FURNITURE & HARDWARE CO.

Auburn, Wash., February 20, 1916.

Oswego Cement Co.

Dear Sirs:

What is the price of your cement delivered to Auburn, Wn. We handle cement at this place.

Yours truly,  
AUBURN FURNITURE & HARDWARE  
CO.

February 23, 1916.

Auburn Furniture & Hdw. Co.,

Auburn, Washington.

Gentlemen:

We have your esteemed favor of the 20th inst. requesting price on "Oregon" cement delivered Auburn.

We would be very glad to supply your requirements, but before quoting you a price, would like to be advised whether you could wait for shipments until about May 1st.

We expect to have our factory in operation here about April 20th, and will be in a position to begin shipments about May 1st, and should you require cement before that date we would not be able to supply you.

Awaiting your further information in the matter, and thanking you for your esteemed inquiry, we remain,

Very truly yours,  
OREGON PORTLAND CEMENT COM-  
PANY,

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Vice-President & Treasurer.

M-W. [545]

Feb. 28, 1916.

Auburn Furniture & Hdw. Co.,  
Auburn, Washington.

Gentlemen:

We have your note requesting price or our product for May 1st delivery. We will be able to make deliveries at that date, but cannot now quote you a delivered price since our freight rates with the O.-W. R. & N. are not yet adjusted.

We expect to have these rates settled within the next few days, and will have a representative call on you some time between now and May 1st.

Hoping that we may be able to do some business

with you, and again thanking you for your inquiry,  
we remain,

Very truly yours,  
OREGON PORTLAND CEMENT COM-  
PANY,

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Vice-President & Treasurer.

M-W.

AUBURN FURNITURE & HARDWARE CO.

Auburn, Wash., May 2, 1916.

Oregon Portland Cement Co.,

Dear Sirs:

We are waiting patiently for prices on your ce-  
ment delivered in our town.

Yours truly,  
AUBURN FURNITURE & HARDWARE  
CO.

By \_\_\_\_\_ [546]

OREGON PORTLAND CEMENT CO.

Oswego, Oregon, May 4, 1916.

Auburn Furniture & Hdwe. Co.,

Auburn, Washington.

Gentlemen:

Acknowledging receipt of your favor of the 2d.  
We have been unable to obtain satisfactory freight  
rates into your territory. We doubt very much  
whether we will be able to quote attractive prices  
to you. We hope to be able to write you again  
shortly.

Thanking you for your communication, we remain,

Yours truly,  
OREGON PORTLAND CEMENT CO.  
C. F. W. HOLLISTER,  
Representative.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[547]

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**Plaintiff's Exhibit No. 82.**

THE VANCOUVER-PORTLAND CEMENT  
CO.,

Tod Inlet, B. C. Sept. 14, 1914.

Aman Moore, Esq.,  
Oswego, Oregon.

Dear Mr. Moore:

Your letter of the 12th with copy of letter from Mr. Morse received. I note some of the smaller shareholders are subscribing to the \$119,000.00 loan, and presume if it were not for the tight money situation, the whole amount would be underwritten quickly, but I believe all subscribers would be glad to let matters stand in "status quo" until the war is over and financial conditions are at normal. Mr. Boettcher wrote me along these lines, but I judge from the tenor of his letter that he is prepared to underwrite more than his proportion of the loan. I enclose a copy of my reply to Mr. Boettcher's letter.

We had a pleasant visit from Messrs Leonardt, Binford and Gilbert. I took them over to Belling-



ham, and Mr. Krabbe, Superintendent of the Bel-  
lingham Plant, returned with me. I hope Mr.  
Leonardt will influence Mr. Boettcher to subscribe  
for \$50 000 00 of the loan, as you suggest.

Kind regards,

Yours very truly,

R. P. BUTCHART,

RPB-EG.

MC.

Enclosure.

Dictated but not re-read by the writer. Signed  
in his absence. [548]

PLAINTIFF'S EXHIBIT NO. 82.—Cont'd.

Sept 14, 1914.

C. Boettcher, Esq., President,

Colorado Portland Cement Co.,

Denver, Colorado.

Dear Mr. Boettcher:—

Your favor of the 8th received, and considering  
the disturbance in the business world created by the  
war situation, I do not wonder that you should  
think it might be well to defer completing the Os-  
wego plant for the present, and from a recent letter  
received from Mr. Moore, I infer a further delay  
will be forced upon us owing to the tightness of the  
money market. The financial condition in Canada  
is much worse than with you, and although I have  
not been so informed, I quite believe I will have a  
difficulty in collecting from my Canadian friends  
their proportion of the amount I have subscribed in  
the Oswego Company.

As you intimate, there is no doubt but that the  
Mills on the Coast are capable of producing much

more cement than can be profitably marketed. This condition, however, has prevailed for the past several years, during which time—excepting for a few periods of short duration—fairly good prices have maintained, and I am glad to say the manufacturers are holding closer together at present, than, I think, ever before. I know the situation pretty well, and feel that the advent of the Oswego Plant's product on the market will only create a ripple of excitement, and that if we do not cut prices in the Portland market, our competitors will not. I believe the sale of an output of a one-thousand or two-thousand [549] barrel plant

PLAINTIFF'S EXHIBIT No. 82—Cont'd.

at Oswego would be pretty well assured in Portland and immediate vicinity, and this being the case, I think the sooner we have the Plant on a producing basis the better, and therefore trust the \$119,000.00 loan will be fully underwritten, and that we may shortly resume building operations.

I have read with interest Mr. Libbey's letter (which I return under separate cover) regarding the Snake River proposition. If \$235,000.00 have already been expended there, it will some day, no doubt, be a competing plant, but I think we need not concern ourselves with it for the present.

Yours very truly,

RPB:EG.

Dictated but not re-read by the writer. Signed in his absence.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[550]

**Plaintiff's Exhibit No. 83.**

**THE NEW WASHINGTON HOTEL.**

Seattle, May 12, 1915.

Dear Mr. Moore,

In conversation with Mr. Coats today, he told me that you had given Mr. Holbrook? (one of the Oregon road commissioners) a good spiel on the advantage of using concrete for road material, but that probably inadvertently had you stated that the present price for cement was high and that California Mills had sold cement at a price of \$1.50 *delivered on the roads*, which Mr. Coats says is not correct. I believe Holbrook has been shown that no such price had been given, and I only write to suggest which of course you know that our attitude must be when we enter the market one that will inspire confidence in our competitors that we wish to maintain prices which at present are none too high. I think we will have little difficulty with our opponents if they are impressed that we will play the game fairly, and the less we say *re* any advantages we may enjoy or anything derogatory to other manufacturers, the better. I learn that the prospects for good trade on the Coast this year are pretty gloomy.

Sincerely yours,

R. P. BUTCHART, (over)

P. S.—Should you see or be writing to Mr. Hunt, kindly ask him to send you a sample and me a sample “Sunflower” sacks, we may be able to use them.—R. P. B.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[551]

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**Plaintiff's Exhibit No. 84.**

**THE VANCOUVER PORTLAND CEMENT CO.**

Tod Inlet, B. C., May 16, 1915.

Dear Mr. Moore:

Your letter of 13th. Note that you are incorporating in Washington and glad to know this is better because it should be quicker. Think it not necessary that you send contracts of machinery ordered to me with specifications of what you wish cancelled.

Note what you say *re* giving a confidential price for cement to road contractor Mr. Coats and other makers do not wish a price to go in until the last moment, they do not wish it known that a cut will be made. Personally I dislike seeing a cut made in our territory but suppose it will be necessary in this case; before you do make a price to a contractor, think it better that you discuss the subject with Mr. Coats.

We have parts of a 7/2' kiln and cooler here, together they would make a very good cooler for the Oswego plant, and could of course be bought at a bargain, and delivered on a scow at Portland at a very reasonable cost.

Sincerely yours,

**R. P. BUTCHART.**

Filed December 24, 1920. G. H. Marsh, Clerk.  
[552]



**Plaintiff's Exhibit No. 85.**

**THE VANCOUVER PORTLAND CEMENT CO.**

Tod Inlet, B. C., May 22, 1915.

Aman Moore, Esq.,

Oswego, Oregon.

Dear Mr. Moore:

Your letter of the 16th and 17th with telegram from Mr. Moran, which I return under separate cover, received.

I trust that Mr. Moran will bid on the work and receive the contract. We have no contractors here large enough to tender for this work. The big ones who operated here when the paving work was going have all gone into insolvency.

Think it will be best that you arrange price with Mr. Price, and hope price will not be too low. Would not advise under \$1.75 delivered on cars, say, in Portland. It is not to the Oswego Company's interests that price should be too low, although of course we must recognize that this particular contract must be treated in an exceptional way.

I note that you now purpose incorporating in Utah. The personnel of the Directorate as you have suggested, is O. K., and will be generally approved. I have not met Mr. Minor, but either Mr. Teal or Mr. Cotton would be most acceptable to all shareholders.

Note what you say regarding your talk with the Road Commissioners and others. When I was told that you had stated the California Mills had deliv-

ered at \$1.50 on the work, I doubted if the information was correct. I now know that you did not make this statement, and am quite sure everything you did say was well to the point to tend to further the extension of concrete roads, and particularly to persuade the Commissioners to decide on using concrete for this proposed work.

In future would leave Mr. Nickerson severely alone and anything of importance we can take up direct with Mr. [553] Coats. I have written Mr.

PLAINTIFF'S EXHIBIT No. 85.—Cont'd.

Coats advising that you were misquoted, and let him know that Mr. Burch and you have and are doing more to secure business for the cement plants than all the rest combined.

Yours very truly,

R. P. BUTCHART.

RPB.LL.

Dictated but not re-read by the writer. Signed in his absence.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[554]

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**Plaintiff's Exhibit No. 86.**

**THE VANCOUVER PORTLAND CEMENT CO.**

Tod Inlet, B. C., June 14, 1915.

Aman Moore, Esq.,

Oswego, Oregon, U. S. A.

Dear Mr. Moore:—

Your letter of the 9th inst. received yesterday on my return from Concrete. I also received letter

from the Ladd & Tilton Bank advising that they held cash and account assignments. Have written them asking for statement showing how the total amount was made up.

I note your comments on why I should pay in the second call, but still think every purpose would be served if my cheque and Mr. Boettcher's were held until reorganization was completed. I am, however, willing to pay over the cash, providing the Bank allows me interest on the first and second call at Savings Bank rate, which I presume in Portland is 3 to 3½.

I note what you say about Mr. Moran and the road contract. It would have been folly to have made him a price of \$1.60 when the lowest quotations made were, I am told, \$1.75. Our company above all others has an object in keeping prices up. There is no reason for cement selling lower at Portland than at San Francisco and Seattle, and I think I can aid in effecting this. Of course, when it is a close fight between concrete and bitumen, as in this case, we are justified in quoting lower. [555]

PLAINTIFF'S EXHIBIT No. 86—Cont'd.

The subscription paper and proxy will go from here, and should reach you a day later than this letter which will be mailed from Victoria. Why delay by sending these forms to Toronto? Why not have some one at Portland sign instead of my brother?

Sincerely yours,

R. P. BUTCHART,

L.

RPB.LL.

Dictated but not re-read by the writer. Signed in his absence.

R. P.,

C/o Vancouver Port, Victoria.

Coates here Am informed lowest price quoted by Washington 1.75. Shall I meet price Moran requested.

AMAN MOORE.

TELEGRAM.

Oswego, Oregon, June 8, 1915.

R. P. Butchart,

C/o Vancouver Portland Cement Co.,  
Victoria, B. C.

Road bids open tomorrow. Moran advises price cement one sixty necessary. Wire me immediate authorization.

AMAN MOORE.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[556]

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**Plaintiff's Exhibit No. 88.**

**THE VANCOUVER PORTLAND CEMENT  
CO., LIMITED,**

Victoria, B. C., Dec. 29, 1915.

Mr. Aman Moore,

/ Oswego, Oregon.

Dear Mr. Moore:

Your letter of 23d inst. received and regret being unable to reply to it earlier. I note all you say about the recent unpleasantness, and am glad mat-



ters are now adjusted, I hope, in such a way as to insure harmonious working of all concerned for the Company's interests. The three men from here, Mr. Newlands, Mr. Macdonald and Mr. Finlay are very capable, and will only be too pleased to consult with you and strive with you to carry out the work to the best advantage.

Regarding sales. I expect you will be in a position to fill orders for cement commencing March 1st, and presume it will be advisable at an early date to notify all contractors, dealers and large consumers of cement, by a circular letter, of this fact. We will be unable to quote prices on any quantity, until we have gone into the subject with the California and Washington makers. Unquestionably the price should be the same at Portland as at Seattle, San Francisco and Tacoma. In the past, Portland has been more or less of a dump. The makers have not been nearly so careful in maintaining prices there, as in their home markets. The price at present in San Francisco and Seattle in car lots is \$1.90, while at Portland it is anything from \$1.60 to \$1.90. It will be difficult for us, a new company, to secure the higher price unless we are permitted to name the price at which cement is [557] to be sold in Oregon. An understand-

PLAINTIFF'S EXHIBIT No. 88—Cont'd.

ing should be arrived at whereby we are assured of disposing of the output of the 1 kiln plant. To obtain this will require careful handling, but I am in hopes that it can be done.

I have no invitation, and in any case will be unable to attend the manufacturers' meeting in San Francisco, but will meet one or more of the makers in Seattle on Monday or Tuesday next and will impress upon them our views. I must be in Toronto on the 10th and purpose returning home by way of San Francisco towards the end of the month, and if necessary will try and arrange to have some of the Washington makers meet me there, to go into the whole subject, and as I am in very close touch with some of the makers, I think it better that you leave this entirely in my hands for the present. Will welcome any suggestions you have to offer.

In regard to your salary. You say, "I shall leave the matter for you to work out along the lines suggested to me while here last Friday." Please back up. I made no suggestions, other than when you stated you were going to Denver to take the question up with Mr. Boettcher, I told you that I was going East, and would go via Denver and help you with Mr. Boettcher if necessary. Now in regard to your receiving some assistance from the Company to carry your stock, it is a pretty difficult matter. I have not the slightest hope that Mr. Boettcher will consent to an increase in your salary, to a loan, or that he will personally aid in carrying your load. I do not see how you can reasonably expect that he should. Like myself, against his better judgment he made his [558] first investment principally

PLAINTIFF'S EXHIBIT No. 88—Cont'd.

to aid you. Both of us have regretted it ever since. Portland has been and is now a nightmare, and it

still must have mighty careful handling in order to earn a small return on the investment. Considering everything, you have come out of it so far pretty well, that is, you have been paid a good salary and all of your expenses, many of them quite unnecessary. Others have not come through so well, and I see no reason why the Company should, even if in a position to do so, help you out to the large extent you apparently require.

If it is as you infer, you depend upon your salary entirely to care for the indebtedness you say you have, it is indeed a heavy burden you are carrying. I do not know why or wherefore you absorb the Douglas National Bank or the Utah cement stock, a total of some \$30,000, neither is it any of my business. I only suggest that if they are told you cannot carry it, would they not take it off your hands? If so, this would relieve the situation a lot, and some other solutions might be found to care for the balance.

As I must be in Toronto on the 10th, and Seattle on the 4th, it is running pretty close for me to call at Denver on my way East. If I can meet Mr. Boettcher then, I purpose returning home via California and will come through Denver, and if you think it worth while that I take the subject up with him, I will do so and endeavor to help your interests all I can. A letter will reach me at Washington hotel, Seattle, on the 3d and 4th, January, and from the 10th to the 12th, January, at the Dominion Securities Corporation, 26 King Street East, Toronto.

Wishing you the compliments of the season,

Yours very truly,

R. P. BUTCHART.

RPB.LL.

Dictated but not re-read by the writer. Signed in his absence.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[559]

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**Plaintiff's Exhibit No. 89.**

Oswego, Oregon, December 31, 1915.

Mr. R. P. Butchart, Director,

Vancouver Portland Cement Co.,

Tod Inlet, B. C.

Dear Mr. Butchart:

Referring to yours of the 29th, I will in this letter discuss the sales matter with you, and in a separate letter discuss the personal matters.

I note all you say in regard to the selling arrangement for our Company. As you know, it has been the universal practice in this country for a new plant when entering the market, to force its way in by cutting prices. This was done by the Kansas plants in forcing their way into the Colorado market in the years 1902 and 1903, when they sold cement on the basis of 55¢ per barrel at factory for their Colorado deliveries. The same methods were adopted when the Washington plants undertook to force the California plants out of the Puget Sound and other Washington markets. The same kind of a fight was again precipitated when the Belling-



ham plant attempted to force its way on the market by cutting prices in Portland and the Puget Sound points. If we can establish our own market without cutting prices, we will have performed a miracle.

I believe, however, that with your acquaintance and friendship with the California and Washington Companies, you may be able to bring about such a result. In order to do so, however, there will have to be six sales agencies abolished in Portland, including three Washington Companies and three California Companies. It would not necessarily [560] mean the abolishment of these selling com-

PLAINTIFF'S EXHIBIT No. 89—Cont'd.

panies immediately, but other companies would have to be able to sell a sufficient amount of cement in order to make these agencies profitable, or otherwise for economical reasons, they would be compelled to abolish same within a few months after we start delivering cement to the trade.

There is just one way in my opinion that you can secure the abolishment of these selling agencies in Portland, and that is by showing the strength of this company along the lines with your plant at Tod Inlet. The best way to do this in my judgment would be for you to make shipments of your cement to Portland in our bags at the earliest time possible. If you should ship but one cargo here, it would be the best argument you could advance to both Washington and California mills that you were in a position to deliver additional cargoes here, and other cargoes, if necessary, at Seattle, San Francisco or San Pedro. The very act of making even one

cargo shipment here would have more weight in causing the California and Washington people to respect us, than anything else that could be said or done.

We have succeeded in arranging a very good schedule of rates from the O-W. R. & N. with the assistance of Mr. Hinshaw, General Freight Agent of the S. P. The new rates will enable us to ship to Olympia, and all points south in Washington including Aberdeen and Grays Harbor points at the same freight rate as the Washington plants now have. It will cost us  $8\frac{1}{2}\text{¢}$  a hundred to ship into Seattle which is the same rate from the Washington plants to Portland. The [561] O.-W.

PLAINTIFF'S EXHIBIT No. 89—Cont'd.

R. & N. Co. have absorbed the charge from Oswego to Portland in granting these rates.

We have also been able to arrange rates so that we will have a big advantage over all competitors in all Central Oregon points. The rates to Eastern Oregon points including Pendleton and other points in that vicinity, will be the same rates as paid by the International Plant at Irwin, just out of Spokane. That plant has a rate of 5¢ less than the Lehigh Portland at Metteline, and these rates are very much lower than the rates paid by the Western Washington mills. We should therefore be able to market our product in Central and Eastern Oregon to good advantage, and should be able to meet the Washington Companies at all points in western Washington along the O.-W. R. & N. tracks between Portland and Seattle.

Under the circumstances the Washington companies should withdraw their selling agencies from Portland, or otherwise should not object if we should go into the Seattle and Puget Sound markets. It seems to me that you could handle this to the best advantage, owing to your friendship with Mr. Coats.

I note in your letter that you expect to be in Seattle on the 3d and 4th. I assume from your letter that you will be going east directly from Seattle, and do not contemplate coming by the way of Portland. Some of these matters are of such importance that I would like very much to discuss them with you personally, and will therefore arrange to leave here on Monday night and will call on you at Seattle Tuesday morning at the Washington Hotel, unless you have other plans that would interfere with such a conference.

Very truly yours,

OREGON PORTLAND CEMENT COMPANY,

Vice-President & Treasurer.

M-W.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[562]

**Plaintiff's Exhibit No. 90.****THE VANCOUVER PORTLAND CEMENT CO.,  
LIMITED.**

Tod Inlet, B. C., December 30, 1915.

Mr. Aman Moore,  
Oregon Portland Cement Co.,  
Oswego, Oregon.

Dear Mr. Moore:

In further reference to your letter of the 23d, the suggestion that you should ship a carload of Oregon sacks to our mill, which we should return to Portland filled with Tod Inlet cement, so that you might start making deliveries of Oregon cement at once.

I prefer not to ship cement to Portland this winter, but if after the first of March, you find you cannot take care of contracts you have made, we will be glad to care for them for you.

I acknowledge receipt of Mr. Cantine's Report dated October 22d, 1914, also copy of your letter of the 17th inst. to Dr. Smith.

Yours very truly,

R. P. BUTCHART.

RPB.LL.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[563]



**Plaintiff's Exhibit No. 91.**

February 11, 1916.

Mr. R. P. Butchart,  
c/o Hotel Del Monte,  
Del Monte, California.

Dear Mr. Butchart:

There are several matters in connection with the Sales Department that should be determined as quickly as possible. I have been holding everything in abeyance until you arrive here. It is quite important to start taking orders now for delivery in April or after factory is completed, since our cement storage capacity here will not exceed 15,000 barrels or two weeks supply.

We should have at least 30,000 to 50,000 barrels booked ready for shipment at the time plant starts up, in order to enable us to run the plant without a shut down, waiting for orders after the factory once begins operations.

The hundreds of small towns in our territory should be canvassed, and at least one dealer in each town selected to handle our "Oregon" brand of cement. Usually one small carload is handled by each of these dealers each year, and it is quite important that we should make some arrangements with them at once, having them delay ordering for the season, until after our plant is operating, or otherwise, our competitors will load them for the season.

The prospects of our Sales Department under existing conditions, are not very encouraging to

us to say the least. With four selling agencies from California and three from Washington, and with the prospects of the Beaver Portland plant at Gold Hill starting up soon after our own plant, and with these people all ready in the field soliciting business, it behooves us to be active at the very earliest [564] possible moment if we expect to sell 1000

PLAINTIFF'S EXHIBIT No. 91—Cont'd.

barrels per day for this year, which is at least 50% of all the cement that will be consumed in our territory.

One important matter should be settled at once, and that is whether we shall do as the other companies are now doing in Portland, i. e., sell to the small sidewalk men and small contractors direct, having a thousand and one accounts that may be questionable, or whether we shall select three or four responsible dealers to handle our output in the City of Portland for us. It is a question as to whether we want to retail our own cement in Portland, or whether we want to wholesale to dealers.

Another important matter should be settled; that is regarding the warehouse at Jefferson Street Station, Portland, where we will have to ship all of our cement. We will be able to locate space for a small warehouse at a cost of \$22.50 per month from the S. P. Co. The location is such that we could have access to the Oregon Electric (Great Northern) tracks at the same time. Should we decide to use such a warehouse, which we will no doubt have to do, we should put up a skeleton wood building

covered with corrugated iron, and have it ready by the time cement shipments begin.

Another matter to be determined, will be the question of whether we will make shipments into the Puget Sound market or not. Also whether we shall enter the Alaska market and the Hawaiian market. Our freight rate from Portland to Alaska or the Hawaiian Islands will be identical with the freight rates from Seattle or San Francisco, and we are therefore on an equal basis for securing business in these territories as our Washington and California competitors.

We sent out a circular letter some time ago, announcing the fact that we would be ready to supply orders in [565] April. I am enclosing a copy of

PLAINTIFF'S EXHIBIT No. 91—Cont'd.

this circular letter herewith. We have had 100 or more inquiries from the trade since we sent them out, requesting agencies and prices. So far, we have not promised a single agency nor have we quoted a single price, as we have been holding everything in abeyance until you reach here on the 17th.

The time has now come, however, when we should take some action along the following lines:

First: We should have a cut of our factory made, approximately costing \$100.00.

Second: We should have a small pamphlet printed as a foreword to the trade with cut of factory on the back of the pamphlet and with a brief description of our plant and prices, with every assurance to the trade that we have built a modern plant and are ready to supply a cement of the highest quality.

The cost of 5000 of these small pamphlets will be approximately \$190.00 including the cut of factory on the back of the pamphlet.

Third: We should start a traveling man out to meet the trade, and arrange agencies in our territory. It will take one man about 4 months to cover the towns in our territory. Should we start this man now, he will be able to select the best dealers in the different towns, and arrange agencies, securing orders for at least one carload in each town, booked ahead for delivery in April or after the plant has been completed.

If we delay sending such a man out, it will mean that later on, we would have to send out three or four men to cover the same territory, and at the later date, we would find most of the valuable agencies already closed for the year with one of our competitors and with the agencies already having [566] carloads in stock which would probably last

PLAINTIFF'S EXHIBIT No. 91—Cont'd.  
them for the season.

Bearing in mind the fact that you may have some things in hand of which we are not advised, we have not attempted to take definite action in any of the above matters without first having your approval. The time has now arrived however, when definite action should be made in many things connected with the Sales Department, and further delay is going to handicap us later on.

Regarding the matter with the Beaver Portland Co., Mr. Burch's son phoned me this morning that his father is now in Chicago arranging to have the



balance of grinding machinery shipped from the Allis-Chalmers Co. immediately. His father wired him that he would reach here on the 16th in time to keep the appointment with you here on the 17th. I am therefore hoping that you will be here on the 17th.

Sincerely yours,

M-W.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[567]

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**Plaintiff's Exhibit No. 92.**

HOTEL DEL MONTE,  
Del Monte, California.

February 15, 1916.

Mr. Aman Moore,  
Oswego, Oregon.

Dear Mr. Moore:

Your favor of 12th received and going on to the second paragraph in your letter I do not know if Mr. Boettcher is open to buy your O. P. C. Co. stock or not. I cannot afford to buy any more at present, neither do I know of any one who would care to buy. I hope to see Mr. Hinshaw and Mr. Coats shortly and will suggest to them that you would part with a portion of your holdings, but imagine they would refuse to purchase except on the basis of the \$306,000.00 issue.

Should I meet any one seeking an investment, will introduce your stock to them.

I have arranged to go to San Francisco on the 17th and will write you afterwards regarding sales. I do not expect to reach Portland until early March.

Sincerely yours,

R. P. BUTCHART.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[568]

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**Plaintiff's Exhibit No. 93.**

Del Monte, California, February 21st, 1916.

Dear Mr. Moore:

Your letter of 17th enclosing inquiry from Mr. I. O. Rhodes, Gen. Pur. Agent S. P., and copy of your answer received.

I will telephone Mr. Rhodes tomorrow and make an appointment with him. As you suggest we should receive the same price at Oswego as the California makers obtain at their mills, and I will endeavor to ascertain what this is. Will write you after I have seen Mr. Rhodes.

Yours very truly,

R. P. BUTCHART.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[569]

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**Plaintiff's Exhibit No. 94.**

Del Monte, California, March 2d, 1916.

Dear Mr. Moore:

Your letter of 20th—I have not as yet seen Mr. Rhodes and am not in shape as yet to name him a

quotation. Mr. Rhodes' assistant has told me that they are in no hurry for the quotation and I do not wish to call to see him until I can give him something definite.

I note what you say regarding pushing sales and am quite as anxious as you that we should get busy on the sales end, but we are not ready to make any quotation to any one. Don't worry. Have you named any price for the car loads you have sold?

I will keep the information you have given me as to the cost of your stock. When I have an opportunity will do what I can to further a sale for you.

I expect to be in Portland some time this month, but really do not know when.

Yours very truly,

R. P. BUTCHART.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[570]

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**Plaintiff's Exhibit No. 95.**

March 6, 1916.

Mr. R. P. Butchart,  
c/o Hotel Del Monte,  
Del Monte, California.

Dear Sir:

Yours of March 2d received. I note what you say about Mr. Rhodes. Hope you will be able to ascertain the price the S. P. are paying for cement f. o. b. California mills, and that you will be able to arrange with Mr. Rhodes to purchase the re-

quirements of the S. P. in Oregon from our company.

In regard to sales matters here, so far, we have not quoted a single price. The orders booked are from regular dealers in country towns, including Roseburg, Dallas, Salem, Pendleton and others. In each case we have been able to secure the best dealer in the town to handle our product. We have received their orders as open accounts with the understanding that we will meet competition when we are finally ready to make shipments. These parties, in other words, desire to handle the Oregon product in preference to California or Washington, and are willing to drop the agencies of that cement for our own, assuming that we will be able to meet competition.

The Warren Construction Co. crowd are attempting to pull off another big bond issue amounting to \$980,000 in Umatilla County, also another one in Union County amounting to approximately \$500,000. They have a score of agents in Pendleton and La Grande, organizing a Good Roads Association, and attempting to put over another deal the same as the one in Multnomah County last year. I sent Mr. Hollister to Pendleton a few days ago to quietly investigate matters and report in detail. In the meantime, I have hammered away at both the City and County officials of Portland and Multnomah County to [571] try to have them recognize the

PLAINTIFF'S EXHIBIT No. 95—Cont'd.  
merits of concrete pavements. Have prepared a



letter to Mr. Dieck, a copy of which I will forward you in a day or two.

In regard to the price of my stock, while the new subscriptions cost me \$95.50, please understand that all my own stock cost me considerably more than \$150.00 per share should I figure the loss in interest for the past five years, and the assessment of \$25.00 per share paid originally on \$36,000 of the old preferred stock which was later exchanged on a basis of 3 shares for one of the new stock, although the old stock had cost \$33.33 plus \$25.00 or \$58.33 per share, and after exchanging three shares for one of the new stock, it cost three times \$58.33 or \$175.00 per share.

In further reference to sales matters at this moment, we should have printed the small pamphlet that I wrote you about some time ago, as a foreword to the trade, explaining briefly the merits of the wet process of manufacturing, the excellent plant we are building, and giving the tests previously made by Spencer B. Newberry and other experts who examined our properties. Such a brief statement is absolutely necessary in order to give the trade confidence in our product. It would cost approximately \$100 to have the cut of factory made, which would be an artist's hand drawing from which small plates would be made for the cut. After this cut of factory was made, it would then cost in the neighborhood of \$150.00 to have 5000 of the small pamphlets printed, making a total expense of approximately \$250.00 plus stamps for mailing. We could then proceed to cover the terri-

tory including several hundred small towns in our vicinity, securing the best dealer in each town and accepting his order for a carload shipment as quickly as our plant was in operation, at a price

**PLAINTIFF'S EXHIBIT No. 95—Cont'd.**

which [572] would meet competition, but without making a definite figure. If you will kindly authorize this action, we will then be in shape to go ahead and book orders so that the plant will not have to stop after once started.

I note that you expect to be here about the end of the month.

Yours very truly,

M-W.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[573]

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**Plaintiff's Exhibit No. 96.**

San Francisco, California, March 14, 1916.

Dear Mr. Moore:

Your letter of 6th received. Mr. Rhodes has been out of town for the last two weeks. I had arranged with Mr. King to try and secure an appointment for us on Mr. Rhodes' return and yesterday Mr. King phoned that Mr. Rhodes would meet me at 9:30 this A. M. In the meantime I had learned that price to the S. P. in California was \$1.40 plus sacks, and at Portland \$1.70 plus sacks. Mr. Rhodes commented on the very great difference, and said it would pay them to purchase their Oregon requirements in California. I explained

the long haul on our raw material over their line, and pointed out to him the several obvious reasons why the S. P. should use an Oregon product in Oregon, etc. Altogether we had quite a satisfactory interview, and am quite sure we will supply them for Oregon work. Mr. Rhodes advised that so far as he knew his company would require very little cement in Oregon this year. Wished us to get in touch with him when we were ready to ship.

I can quite understand your impatience to push sales. Some of the Washington makers will be here Friday. I expect we will have something definite next week, in the meantime just as well to forego any expenditures in the way you suggest. I note that the Warren Construction Company are busy, and am pleased to know that Mr. Teal and you have started a campaign to checkmate them. I have read your article or letter to Mr. Dieck, "Concrete versus Bitumen Pavements" sent with your letter of 11th, with great interest, and compliment you on getting out so excellent an article, and I will take the subject up with the Washington makers and obtain their views [574]

PLAINTIFF'S EXHIBIT No. 96—Cont'd.

regarding your suggestion that the makers meet in Portland to discuss the subject. We must also try to secure the co-operation of the California Mills.

Yours very truly,

R. P. BUTCHART.

Filed December 24, 1920. G. H. Marsh, Clerk.

[575]

**Plaintiff's Exhibit No. 97.**

Los Angeles, California, March 31, 1916.

Mr. Aman Moore,  
Oregon Portland Cement Co.,  
Oswego, Oregon.

Dear Mr. Moore:

I learn with regret that you have recently had Mr. Hollister in Washington soliciting business for our Company. This is in the face of a request that you do nothing in this respect other than to advise the trade by circular letter that Oregon cement will be on the market in April.

You assured me that you would do nothing further than this. I would ask you again to leave the sales alone for a time and I have written Mr. Newlands to confer with you regarding some other position in the works for Mr. Hollister.

Yours very truly,  
R. P. BUTCHART.

(Copy)

Los Angeles, California, March 31, 1916.

Mr. L. C. Newlands, Superintendent,  
Oregon Portland Cement Co.,  
Oswego, Oregon.

Dear Mr. Newlands:

Enclosed please find copy of letter to Mr. Aman Moore. Mr. Hollister has been doing things he should not do, at Walla Walla, Washington, and Baker, La Grande and Pendleton, Oregon, and although Mr. Moore is responsible for this, I do not



see that we require Mr. Hollister's services further in connection with sales. If you can find anything else around the plant that he can do and make himself useful you might arrange to retain him, but if you cannot do so profitably you would better ask for his resignation. [576]

PLAINTIFF'S EXHIBIT No. 97—Cont'd.

Trusting that everything is moving along nicely, I am,

Yours very truly,  
(Signed) R. P. BUTCHART.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[577]

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**Plaintiff's Exhibit No. 98.**

OREGON PORTLAND CEMENT CO.

Oswego, Oregon, March 28, 1916.

Mr. John C. Eden, Pres.

Superior Portland Cement Co.,  
Seattle, Wash.

Dear Sir:

We have your esteemed favor of the 25th, and can understand your position. We appreciate very much your kind offer to have Mr. Reitze assist us in the fight we have ahead of us with the Warren Construction Co. We appreciate the fact that this is their stronghold, and that we will have to start to uproot some of the biggest trees politically and otherwise in the State of Oregon.

We are to-night sending Mr. John O. Barr, of the Firm of Barr & Cunningham, Consulting En-

gineers of Portland, to Seattle to confer with Mr. Reitze. Mr. Reitze has promised to lend us newspaper clippings and other information pertaining to the Portland fight of last year.

Assuring you of our appreciation of your kind offer of assistance and co-operation, we remain,

Very truly yours,

OREGON PORTLAND CEMENT COMPANY,

AMAN MOORE,

Vice-President & Treasurer.

M-W. [578]

April 3d, 1916.

Mr. Aman Moore, Vice-President,  
Oregon Portland Cement Co.,  
Oswego, Oregon.

Dear Sir:

I have yours of March 28th. Since writing you, Mr. Reitze, our Engineer, has made a report on the conditions of the pavement of Linnton Road, where the bitulithic interests are evidently employing their old tactics of breaking up the pavement in order to discredit the concrete.

The Northern mills, as you know, spent a lot of money in the fight we conducted in Multnomah County a few months ago, and even though we will probably be out of the cement business in Oregon when your plant starts, I would naturally dislike to hear that part of our work at least had been nullified by the action of the Warren people. I would suggest that you get some of your newspaper men to go over the Linnton Road situation, and

endeavor to get some publicity and head of work of this kind in the future.

Yours truly,

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President.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[579]

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**Plaintiff's Exhibit No. 103.**

March 6, 1916.

Oregon Portland Cement Co.,  
Oswego, Oregon.

Attention Mr. Moore.

Gentlemen:

Confirming our telephone conversation with Mr. Moore, we would thank you for quotation on 100,000 barrels of your cement, f. o. b. Seattle,—delivery to be made between May 1st and September 1st, 1916. Time of delivery may possibly be extended to November 1st. It is possible that we may need a much larger amount than this, and would like to hear from you as to the capacity of your plant,—quality of your product,—and any other information which might be of assistance in securing business for your material.

Yours very truly,

DENNY-RENTON CLAY & COAL CO.,

By \_\_\_\_\_,  
Assistant General Manager.

JFK:L.

Oswego, Oregon, March 11, 1916.

Denny-Renton Coal & Clay Co.,

Seattle, Washington.

Gentlemen:

Your esteemed inquiry of the 6th inst. requesting price on 100,000 barrels of Portland Cement f. o. b. Seattle, has been received and contents carefully noted.

Mr. R. P. Butchart, the president of our company, is now in California, and we expect his return here within the next week or two. We are awaiting his arrival before making any decision as to what we shall do in regard to the Seattle market. We have had several other requests for prices and agencies in Seattle but will not make any final determination of the matter until Mr. Butchart reaches here. We will then send a representative to Seattle who will call on you before any final [580] arrangements are closed.

PLAINTIFF'S EXHIBIT No. 103—Cont'd.

We appreciate your inquiry very much, and remain,

Very truly yours,

OREGON PORTLAND CEMENT COMPANY,

AMAN MOORE,

Vice-President and Treasurer.

M-W.



March 13, 1916.

Oregon Portland Cement Co.,

Oswego, Oregon.

Attention Mr. Aman Moore.

Gentlemen:

We beg to acknowledge receipt of your letter of March 11th, advising us that the matter of our inquiry for quotation on Cement would have to rest until the return of Mr. Butchart from California, at which time you would send a representative to Seattle who would call upon us regarding this matter.

Yours very truly,

DENNY-RENTON CLAY & COAL CO.,

By \_\_\_\_\_,

Assistant General Manager.

JFK-L.

Filed December 24, 1920. G. H. Marsh, Clerk.

[581]

**Plaintiff's Exhibit No. 104.**

**TELEGRAM.**

San Francisco, Calif., Aug. 2, 1915.

Willis R. Lebo & Co.,

Aberdeen, Washington.

Your wire even date cannot accept contract am writing fully.

**HENRY COWELL LIME & CEMENT CO.**

San Francisco, August 2, 1915.

Willis R. Lebo & Co.,

Aberdeen, Washington.

Gentlemen:

Responding to your telegram of the second instant, we have just wired you as follows: "Your wire even date. Cannot accept contract. Am writing fully," and beg to advise that we must withdraw the \$2.40 quotation. Can now quote you \$2.70, less usual sack allowance, dealer's commission and cash discount.

Yours very truly,

W. H. GEORGE,

Secretary.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[582]

**Plaintiff's Exhibit No. 105.**

**HENRY COWELL LIME AND CEMENT CO.**

San Francisco, California, Feb. 1, 1916.

Mr. Carl Leonardt,

C/o Southwestern Portland Cement Co.,

H. W. Hellman Bldg.,

Los Angeles.

My dear Mr. Leonardt:

I arrived home safely and want to thank you for your very kind and courteous treatment when I was at Los Angeles.

Please remember me kindly to Mr. Merrill and to Mr. Schirm.

I hope that by this time the get-together talk which I made it my particular business to give all of those who are in the lime business, is bearing fruit, and that the conditions are better and settled.

I congratulate you on the layout and character of your new cement plant and trust that when she begins operation you will find a ready market for a reasonable output, at the highest price, and under regular terms and conditions.

Regarding regular terms and conditions: I enclose you herewith a little suggestion which I trust will be interesting. We have found it to work out to the best possible advantage here.

I hope to be able to write you in a few days that the allowance for returned empty sacks has been changed to 71½¢.

Again thanking you, and conveying to you my best personal regards, I remain,

Yours very truly,

W. H. GEORGE,

Secretary.

WHG-W. [583]

Monday, February 7, 1916.

Mr. W. E. George, Sec'y.

Henry Cowell Lime & Cement Co.,

2 Market St., San Francisco, Cal.

My dear George,

I received your letter of February 1st and thank you very much for the contents. That is the proper spirit! I refer to where you mention regarding our new cement plant that you "trust when it begins operation we will find a ready market for a reasonable output, etc.

Some of our cement manufacturers seem to think that no one else has a right to engage in the same business and manufacture and sell cement, which is entirely wrong as this is a free country and every man has a right to make an honest living, and any combine to ruin a competitor by misrepresentation and crookedness is wrong, which soon or late they will find out to their sorrow if they do not change their tactics.

You know a good neighbor cannot live in peace if the bad neighbor does not want him to. The Portland plant as well as the Victorville plant wants to live in peace, but no man has the right to say that these plants have no right to manufacture or sell cement. These plants only want their



rights, which they hope to obtain by peaceful and harmonious methods. Of course you know what it means to a large manufacturer as compared with one that has less capacity, when it comes to price cutting. I leave it to you to say who can stand it the longest.

I was in San Francisco last Saturday, leaving the same evening. I talked with your office, but you were at the [584] factory. Mr. Butchart was with me and no doubt will write you from Del Monte. You can see him at any time and go into details with him, and should something of importance come up I will be willing to go to San Francisco at any time.

Wishing you success, I am,

Yours very truly,

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President.

HENRY COWELL LIME AND CEMENT CO.  
2 Market Street.

San Francisco, Feb. 8, 1916.

Carl Leonardt, Esq.,

Pres. Southwestern Portland Cement Co.,

710 H. W. Hellman Bldg., Los Angeles.

Dear Mr. Leonardt:

I am just in receipt of yours of February 7th and hasten to reply.

I am willing to admit the truth of every word that you say and you know how I feel about these matters. I feel that that is exactly the way they should be carried out.

Undoubtedly by this time you have my other letter written from the plant on last Saturday.

At this writing I am at a loss to know where Mr. Butchart is. My understanding was that he was going to Los Angeles, probably with you from San Francisco, altho my first impression was that he was going direct to Los Angeles. I have written him in your care at Los Angeles, and am now awaiting results as to whether it is best for me to go to Los Angeles, to see him at Del Monte when he goes there, or to await his arrival again at San Francisco. [585]

When in Los Angeles I outlined to you what I want to say to Mr. Butchart, and I do hope that it will be agreeable and work to a satisfactory end. I shall be very glad indeed to advise you of all results.

Thanking you indeed for your many courtesies, I remain,

Yours very truly,

WHG-W.

W. H. GEORGE,

Secretary.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[586]

**Plaintiff's Exhibit No. 116.**

Portland, Oregon, April 4, 1916.

Mr. S. F. Clark, Purchasing Agent.

City.

S. P. & S. Ry Co.

United Ry. Co.

Ore. Elec. Ry. Co.

Ore. Trunk Ry. Co.

Dear Sir:

Please be advised that owing to the extreme shortage of cars and the coming into the market of the Oregon Portland Cement Company, we are withdrawing from this market and are closing our Portland office.

Thanking you for past favors, we beg to remain,

Yours very truly,

WASHINGTON PORTLAND CEMENT CO.

BMP:P.

Per BERT M. PURCHASE.

Filed December 24, 1920. G. H. Marsh, Clerk.

[587]

**Plaintiff's Exhibit No. 117.****PACIFIC PORTLAND CEMENT COMPANY,  
CONSOLIDATED.**

No. Portland.

San Francisco, Cal., March 24, 1915.

Pacific Portland Cement Company, Consolidated.

Portland, Oregon.

Gentlemen:

Receipt is acknowledged of your night letter of yesterday's date reading as follows:

"Bellingham Bay Improvement Company, Bellingham, Washington, telegraph us for price fifteen thousand barrels cement May, June, July delivery f. o. b. Bellingham shall we quote two forty."

As we understand that the present list price of the Washington Mills is \$2.30 f. o. b. Bellingham, we have telegraphed you that it is quite in order for you to quote as you desire, and if the business is received by us on this basis, we shall certainly be glad to fill it.

Yours very truly,

F. W. ERLIN,

FWE-C

Secretary and Sales Mgr.

**TELEGRAM.**

Portland, Oregon, March 23, 1915.

Pacific Portland Cement Co.,

Pacific Bldg., San Francisco, California.

Bellingham Bay Improvement Company Bellingham Washington telegraph us for price fifteen



thousand barrels cement May June July delivery  
fob Bellingham Shall we quote two forty.

**PACIFIC PORTLAND CEMENT COM-  
PANY, CON.**

**TELEGRAM.**

San Francisco, Cal., March 24, 1915.

Pacific Portland Cement Co. Cons.

411 Board of Trade Bldg.,  
Portland, Oregon.

Quite in order for you to quote Bellingham two  
forty.

**PACIFIC PORTLAND CEMENT CONS.  
CO.**

Filed December 24, 1920. G. H. Marsh, Clerk.  
[588]

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**Plaintiff's Exhibit No. 119.**

**PACIFIC PORTLAND CEMENT COMPANY,  
CONSOLIDATED.**

San Francisco, Cal., June 12, 1916.

Pacific Portland Cement Company, Consolidated.

Portland, Oregon.

Gentlemen:

Yours of the 10th with order from Sanborn &  
Son, Astoria, is at hand. Under the circumstances  
we will, of course, bill this at \$2.30 Astoria, and  
will advise you as soon as we know what shipping  
arrangements we can make, and whether or not it  
would be advisable for us to ship on the North Pa-  
cific Steamship Company's boats.

As for the work which the Washington Paving Company were low on at Astoria, inasmuch as this came up some time ago and their bid submitted in good faith, we would say that they would be entitled to the \$2.30 price for direct mill shipment, as undoubtedly they figured it on this basis. Of course the quoting of cement on this would be a contingency depending upon their going ahead with the work, and as we understand your letter, this has not been decided at this time. However, if they do go ahead on that old contract you will please quote them \$2.30 as this is undoubtedly the figure that would be named them by anybody dealing with them.

Yours very truly,

F. W. ERLIN,

FWE-C.

Secretary and Sales Manager.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[589]

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**Plaintiff's Exhibit No. 131.**

**HOTEL STATLER.**

Detroit, Mich., July 14, 1916.

Mr. Clarke Moore,

Sales Manager, Colorado Portland Cement Co.,  
Denver, Colorado.

Dear Mr. Moore:

Very glad on my arrival here yesterday to receive your letter of 5th from Denver, with information regarding sales and prospects. I am pleased to know that the cement is being so favorable received

in Portland. No doubt as you suggest, our competitors did their best to glut the market prior to our commencing operations. Considering this and that we are introducing our product, I suppose we must conclude that we are doing as well as could be expected. We will hope that market conditions will improve. If not, at the price at which we sell, it will be very uphill work to make ends meet. I have not the costs of manufacture for June, expect this when I reach Toronto early next week but at \$1.46 net to us at Oswego, the price at which the Pacific contracts have been made on the 25,700 barrels, I am very doubtful if we will break even. This price is extremely low and quite disappointing as I was under the impression that on all sales to points outside of Portland, the Portland price at the works or at Portland would obtain; that is, it would cost the Astoria, Dallas, Tillamook buyer the Portland price plus freight, from Portland or Oswego, which I believe is the same. [590]

Would you kindly write me as to this to c/o Dominion Securities Corporation, 26 King St. E., Toronto, and say if this price is net after deducting cost of sales office expenses.

I note the expenses in the Sales Office and do not see how they can, at this time, when introducing our goods and under present conditions, be reduced. We will hope for better times in the near future, when your organization will be able to easily dispose of the output.

We have had a strenuous trip from Seattle, roads mostly very bad; covered a few stretches of nice con-

crete roads and notice that the sun shone much brighter over these spots and the atmosphere was much more pleasing. The worst of our trip is over and we will have much improved conditions for the balance of the journey, but if you should consider motoring from Coast to Coast for a pleasure trip, don't. Visited the Ford and Packard Plants today; they are wonderful.

With kind regards,

Yours very truly,

R. P. BUTCHART.

Denver, Colo., July 18, 1916.

Mr. R. P. Butchart,

c/o Dominion Securities Corporation,

26 King St. E.,

Toronto, Canada.

Dear Mr. Butchart:

I am in receipt of your letter of July 14th, for which I wish to thank you, and first of all I want to urge upon you, if it is at all possible to do so, to come to Portland, Oregon, and meet Mr. Boettcher, who will be there during [591] the week beginning July 24th. I presume Mr. Boettcher will be there two or three days. He has gone to Montana on a proposition that will take his time during this present week. I expect to leave for Portland tomorrow, and I will probably remain there for two or three weeks. If you can meet Mr. Boettcher in Portland, I am certain, that it will be time well spent, as matters of great interest can be settled once and for all at that time. I cannot urge upon you too strongly to be there at that time, if possible.



Regarding the matter of sales and the low price on contracts taken, which net us at Oswego \$1.46 per barrel, would say, that we took over a contract of, approximately, 4000 bbls., that was sold by the Washington Company to the County, which was sold at \$1.50 f. o. b. Portland, or, which is \$1.40 f. o. b. Oswego net to us. We took another contract at Astoria, which was sold at \$1.70 per bbl. f. o. b. Astoria, which was the price prevailing when we started our factory, but which has now been advanced to the Portland price plus the freight. The contract referred to of 3000 bbls. will only net us \$1.32. Also, some of the other contracts, which amount to several thousand barrels, were sold for delivery at Marshfield, a coast point, where we had to meet California competition, and where the California factories have a very great advantage in freight, against our freight rate from Portland. This only nets us \$1.37 per barrel. We will, however, have a lower rate, I believe, into that country, when the railroad which is now building will be completed, and it may be that we will deliver some of the cement after the completion of the railroad and thereby net us a little better price. We have secured for every order sold, the highest delivery price that has been quoted by our competitors, and, of course, we cannot secure for our [592] cement any more money than is being asked by our competitors. I thought it was better to take on this business at the prices named, because later on we may be able to secure better delivery prices, besides being able to have some tonnage to ship, and in addition to this,

the effect that it will have on our competitors, for us to secure business at prices named by them. From the prices I have given, there are no sales expenses figured off. Of course, the cost of manufacture is no doubt high for the first month, but surely the cost of manufacture should be very much lower from this time on. We will certainly use every effort possible to keep expenses at the minimum, and you may rest assured, that every barrel of cement will be sold at the highest possible price, that can be obtained. This is shown in the sales we have made to retail dealers, which show a net return f. o. b. Oswego of \$1.70 per bbl., which is the price we are asking for shipments to Portland.

I sincerely hope to meet you in Portland next week and go into all of these matters further in detail. I assure you, that your presence will give me great pleasure, in which I can assure you, that everybody joins me.

Yours very truly,

---

Gen'l Sales Manager.

CMM/CP.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[593]

**Plaintiff's Exhibit No. 138.**

**OREGON PORTLAND CEMENT CO.**

Oswego, Oregon.

Denver, Colorado, April 27, 1916.

Mr. C. T. W. Hollister,

Oregon Portland Cement Co.,

Oswego, Oregon.

Dear Sir:

I am enclosing, herewith, business contract with the Home Telephone and Telegraph Co., of Portland, Oregon, properly signed. Also the envelope you sent me for approval, and I wish you would order 2000 of the large ones and 5000 of the smaller ones, from the Government, at once.

I am also enclosing herewith a larger envelope, which has my address on it, and I wish you would order 500 of these also from the Government, stamped, as well as with the return card in the upper left hand corner, which the Government prints. These envelopes I wish you would ask them to make in some other color than white, for the reason, that those addressed to me by the salesmen of the Colorado Company are white, and those of the Three Forks Co. are buff, and any other color, therefore, that you think would be good, will be entirely agreeable to me, but I would suggest, that a light blue would be very suitable. The printing on the envelopes, of my name and address, will have to be done after they are returned by the Government. That we can have done by some printer

in Portland. The prices stated in your letter are correct.

I received the map and the express package, enclosing the freight tariffs yesterday, and we are working on them and expect to have them in shape so that I can take them with me to Portland in the course of a couple of weeks.

I wish you would let me know at once how Mr. Newlands is getting along at the factory, and whether he can give us any more definite idea when he will have cement ready to sell. I think it would be well for us to have anywhere from 1000 to [594]

PLAINTIFF'S EXHIBIT No. 138—Cont'd.

10000 bbls. on hand, before we go out soliciting business vigorously and telling people we are ready to deliver cement. I will be glad to receive this information at the earliest possible moment.

Regarding the Washington and Olympia Portland cement companies selling cement in Portland again on a temporary arrangement, would say for your information, it is my understanding, that they have some contracts they are completing.

I thank you for the clipping you enclosed, regarding the Salem bridge, which I will look over carefully.

Yours truly,

CLARK M. MOORE,  
General Sales Manager.

CMM/CP.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[595]



**Plaintiff's Exhibit No. 142.**

July 12, 1916.

Mr. Clark M. Moore,  
c/o Colorado Portland Cement Co.,  
Denver, Colorado.

Dear Sir:

Mr. Robson called yesterday and stated that some body sold the northwest Steel Company 50 barrels of California cement at \$2.35 delivered. We checked this up and Mr. Statter advised that the Northwest Steel Company asked the Tait Transfer Company for a price to deliver said 50 barrels and Tait delivered for 5¢ per barrel, making \$2.35 at the Northwest Steel Works,—a \$2.45 point. Mr. Statter explained that it was a pretty hard thing to control conditions of this kind, and the same is admitted by Mr. Robson.

We are greatly pleased to receive orders through Mr. J. E. Moore for 80 barrels to the Carl E. Fisher Lbr. Co. Eugene and 200 barrels to W. C. Hall, Eugene, both 50-day deliveries.

Your brother will be as far south as Ashland tomorrow and is figuring on working back.

Mr. Wellman attended the meeting of the City Council at Estacada last night and, on account of a defect in the specifications, they will readvertise. He states that the feeling there is very friendly towards "Oregon." From Estacada Mr. Wellman ran across the country to Oregon City and Hillsboro and will be in Portland tomorrow and he will then canvass the city thoroughly. [596]

Kindly note attached letter from the Astoria Fuel & Supply Company and our reply to them. Also clipping from the Morning Oregonian which is of interest. In this connection, we today received a letter from Geo. W. Sanborn & Sons, Astoria, asking for a quotation. This request is of interest in connection with the clipping as we quoted Sanborn on June 26th the advanced price. We are again quoting Sanborn.

Mr. Harris, of the McCracken Company, states this morning he has canvassed the City thoroughly on his motorcycle and finds "Oregon" universally throughout the city. I visited Tranchel & Parelus's job, also Luke Dangerfield's job and Oregon is being used and they are greatly pleased with it and state that in the future there is nothing but Oregon. There is not a great deal of work going on in Portland. From the papers there seems to be considerable work east of Umatilla. We have had two or three inquiries for quotations from that section in reply to the circular letter you dictated and we are quoting on the basis of \$2.30 Portland, nothing said about 10¢ dealer's commission. On the \$2.30 basis we received an order from J. D. Bower, Dayton, Wash.

Weather here is hot and fair.

Regards to you from one and all.

Yours truly,

H-D. [597]

OREGON PORTLAND CEMENT CO.

Oswego, Oregon.

Denver, Colo., July 17, 1916.

Mr. C. T. W. Hollister,

c/o Oregon Portland Cement Co.,

Portland, Oregon.

Dear Sir:

I am very glad, indeed, to receive your letter of July 12, giving me so much in detail the conditions.

The first paragraph of your letter refers to the Northwest Steel Co. having bought cement at \$2.35 per bbl. at the plant, when our price would be \$2.45. From your letter I take it, that the Golden Gate people sold this cement and the Tait Transfer Co. hauled it for 5¢ per bbl., in which case we certainly can have no objection, as our price f. o. b. the dock would be \$2.30, which is the price, I understand, that the Golden Gate people received for the cement.

I am very much pleased to note on your shipping report that Mr. McMillan is now trading with us. Please say to him, that I appreciate this information very much.

The last paragraph of your letter is very gratifying, and I note we seem to be furnishing the City of Portland with a greater percentage of their cement requirements than I had felt might be the case. I enclose copy of my letter to Mr. Halderman, which is self-explanatory, and I certainly want to go into this matter with him when I am next in Portland.

I am returning herewith correspondence for your files.

Yours very truly,

CLARK M. MOORE,

Gen'l Sales Manager.

CMM/CP. [598]

Denver, Colo., July 17, 1916.

Astoria Fuel and Supply Co.,

Astoria, Oregon.

Dear Sirs:

Attention Mr. C. W. Halderman, Manager.

Your very courteous letter of July 10th has been forwarded to me here, and I appreciate very much the seriousness of the propositions therein referred to, and I am more than anxious to get into these matters in detail with you, personally.

I expect to be in Portland the latter part of this week and will 'phone you very soon after my arrival; and anticipating the pleasure of going over this matter with you, I beg to remain meantime,

Yours very truly,

---

Gen'l Sales Manager.

CMM/CP.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[599]

May 4, 1916.

Auburn Furniture & Hdwe. Co.,

Auburn, Washington.

Gentlemen:

Acknowledging receipt of your favor of the 2d,



We have been unable to obtain satisfactory freight rates into your territory. We doubt very much whether we will be able to quote attractive prices to you. We hope to be able to write you again shortly.

Thanking you for your communication, we remain,

Yours truly,

OREGON PORTLAND CEMENT COMPANY,  
Representative.

H-W.

Mr. Moore: Auburn between Tacoma and Seattle. May be friends of Washington plants after data.

HOLLISTER.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[600]

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**Plaintiff's Exhibit No. 146.**

1104 Wilcox Building, Portland,  
June 10, 1916.

Chehalis Brick & Tile Co.,

Chehalis, Washington.

Gentlemen:

We thank you for your letter of June 7th, regarding your handling our cement, and would say that it is not our intention to establish any jobbing agencies anywhere.

However, we will be glad to take up the matter with you a little later on, when we are in position to furnish sufficient quantity of cement to take care of the requirements of all the territory

tributary to our factory. At the present time, we have several orders for shipment into Oregon in nearby territory, and as our output is very limited at this time, because of just beginning operations, we do not want to overreach our capacity, but will be glad to take the matter up with you at some future date.

Yours very truly,

---

General Sales Manager.

M-W.

Chehalis, Wash. 6-7-16.

Oregon Portland Cement Co.,

Oswego, Oregon.

Gentlemen:

We sell 90% of all common and fire brick in all southwest Washington but so far have not taken up the handling of cement. Just now we have inquiry for 500 sacks Portland cement in combination with a fire and common brick order for Raymond, Washington. Kindly write what is the very best price you can give on the above quantity FOB Raymond and also what price you could give us on carload lots from Chehalis and [601] vicinity.

PLAINTIFF'S EXHIBIT No. 146—Cont'd.

We often have inquiries in conjunction with other work and if we can do anything that will be of mutual advantage, we might be pleased to take the matter up. Our firm keeps a salesman on the road covering from near Olympia to Vancouver, Washington, including all Grays Harbor and Willapa Harbor points as well as all intervening stations.

Awaiting your answer, we remain,

Yours truly,

CHEHALIS BRICK AND TILE CO.,

Per S. J. SAINDON, Sec.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[602]

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**Plaintiff's Exhibit No. 147.**

**TELEGRAM.**

Aberdeen, Wash., June 13, 1916.

Oregon Portland Cement Co.,

Oswego, Oregon.

Relative to past correspondence we would like to quote tomorrow on three thousand barrels cement for street work. Please wire at once if you can give us price.

**ABERDEEN MANUFACTURING CO.**

June 16, 1916.

Aberdeen Mfg. Co.,

Aberdeen, Washington.

Gentlemen:

Your telegram of June 13th did not reach this office until today, having evidently been delayed at Oswego, and consequently we know we are too late to give you a price on the 3000 barrels of cement you asked for. We have a little cement at our factory as we have just started manufacturing, but expect before long to have quite a stock ahead.

We have a few orders in territory immediately adjacent to our factory which we want to take

care of before going into territory further away, but expect to be in position to make you quotation later on, when we will be glad indeed to take the matter up with you.

Thanking you most kindly for the inquiry, we remain,

Very truly yours,

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General Sales Manager.

M-W.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[603]

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**Plaintiff's Exhibit No. 148.**

April 26, 1916.

Mr. F. R. Clark, Purchasing Agent,  
City of Centralia,  
Centralia, Washington.

Dear Sir:

Acknowledging receipt of your favor of the 25th. We regret very much at this time we are unable to quote you on cement. The rate question in your territory has not been settled, and until same is adjusted, nothing can be done. We will again write you shortly.

Yours very truly,  
OREGON PORTLAND CEMENT COMPANY,  
Representative.

H-W.



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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Transcript of Record.  
(IN THREE VOLUMES.)

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R. P. BUTCHART and CLARK M. MOORE,  
Plaintiffs in Error,  
vs.  
THE UNITED STATES OF AMERICA,  
Defendant in Error.

---

VOLUME III.  
(Pages 673 to 942, Inclusive.)

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Upon Writ of Error to the United States District Court of the  
District of Oregon.

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FILED  
SEP 27 1922  
F. D. MONCKTON,  
CLERK.



United States  
Circuit Court of Appeals  
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Upon Writ of Error to the United States District Court of the  
District of Oregon.

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THE CITY OF CENTRALIA.

Centralia, Washington, April 25, 1916.

Oregon Portland Cement Co.,

Dear Sirs:

Yours of April 11th was received; was pleased to hear that you was expecting to be able to quote cement prices soon; now could you give me some idea what the price would be f o b Centralia. Do you think you could make a price at \$2 per bbl., or something like that; what you say to me will be strictly private. We will be ready to use cement about the middle of May; would you care to have someone represent you here in Centralia. I would be very pleased to hear from you as soon as convenient how you are getting along.

Yours very truly,

F. R. CLARK.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[604]

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**Plaintiff's Exhibit No. 151.**

SP&S will publish rate  $13\frac{1}{2}$  on cement C. L. from Irvin, Washington, to Vancouver, Washington and Portland, Oregon, if Irvin plant secure contract for Interstate Bridge cement.

W. D. SKINNER,

T. M.

Portland, Oregon, 3/6/15.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[605]

**Plaintiff's Exhibit No. 152.**

W. D. Skinner, Traffic Manager,  
S. P. & S. Ry. Co.,  
Portland, Oregon.

Dear Sir:

Referring to pencil memorandum you gave the writer on Saturday, the 6th inst., in which you agreed to publish  $13\frac{1}{2}\text{¢}$  rate on cement from Irwin, Washington, to Vancouver, Washington, and Portland, Oregon, provided we secured Interstate bridge contract, would say that we have closed contract to furnish that cement, and confirming the writer's talk with you on the 6th inst., please see that that rate is published with the least possible delay, advising us as soon as possible when same will become effective and whether intermediate points will take the same rate.

Very truly yours,  
INTERNATIONAL PORTLAND CEMENT  
COMPANY, LTD.

Sales Manager.

B:R.

Filed December 24, 1920. G. H. Marsh, Clerk.  
[606]

**Plaintiff's Exhibit No. 153.**

**DAY LETTER.**

March 11, 1915.

W. D. Skinner, Traffic Manager,  
S. P. & S. Ry. Co.,  
Portland, Oregon.

We have not yet received copy of tariff covering rate to Vancouver and Portland that you and your Spokane agent agreed to give us. Acting upon agreement we have contracted to furnish approximately ten thousand tons. Must have tariff effective at earliest possible date. Answer.

**INTERNATIONAL PORTLAND CEMENT  
COMPANY, LTD.**

**TELEGRAM.**

Portland, Oregon, March 11, 1915.

International Portland Cement Co. Ltd.,  
Spokane, Washington.

Wire date as explained Mr. Berry by telephone ninth and letter to-day my hands temporarily tied as to publication tariff. Have discussed situation fully with Pacific Bridge Company who are satisfied to leave matter my hands for few days when hope be able advise definitely.

**W. D. SKINNER.**

Filed December 24, 1920. G. H. Marsh, Clerk.  
[607]

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**Plaintiff's Exhibit No. 163.**

J. H. Block. November 10, 1920. Page 2.  
“after you left Chicago, the Association proceed-

ings were very interesting, and I believe that a great amount of good for the industry was accomplished, and my only regret was, that you were not there, as I am certain you would have enjoyed most of the meetings, although they are usually tiresome. Everything I had on my mind to discuss with our friends, terminated satisfactorily to us, and in that way I felt, that my trip to Chicago was a very profitable one."

\* \* \* \* \*

Regarding the Government bids, which will be received here on May 25th, I would say, I am putting in a bid for the Oregon Portland Cement Co. at our regular dealer's price, which will be high, but which will get our name before the Reclamation Service. In Montana, we will bid \$1.50 net f. o. b. Trident. In Colorado, I have not definitely decided whether to bid more than \$1.00, or not, but am afraid to bid much higher than that.

\* \* \* \* \*

I am going to Portland, Oregon, via San Francisco, where I will see our friends, and I am very much pleased to have received letters since I saw you, from Mr. Erlin, of the Pacific Portland Cement Co., and Mr. Muhs, of the Santa Cruz Co., asking, if it would not be possible for me to go to Portland via San Francisco, so as to discuss matters of interest. As you know Mr. Leonardt was here, and went via Portland, Colorado to Ogden, where he will see Mr. Pingree, as well as Mr. Day, and make an effort to buy the Ogden plant.



I am enclosing herewith, for your information, correspondence I received from Mr. Short regarding the Lewiston proposition, all of which is self explanatory, and it is my candid opinion, that Mr. Morse certainly made a hell of a mess handling [608] this proposition, and it certainly seems now

PLAINTIFF'S EXHIBIT No. 163—Cont'd.

that the opportunity is lost to us. However, I am enclosing you, herewith, copy of a letter I have just written Mr. Short, in which I make a suggestion, which may, or may not, have any merit. Of course, I leave this entirely to you to decide. In case another cement company goes into Montana, at Lewiston, we will have lost at least one-third of our business, even if we could be able to maintain good prices."

Filed December 24, 1920. G. H. Marsh, Clerk.  
[609]

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**Defendants' Exhibit No. 1.**

**CONSTITUTION.**

1. The name of the Association shall be ASSOCIATION OF AMERICAN PORTLAND CEMENT MANUFACTURERS.

(Amended May 10, 1916.)

The name of the Association shall be PORTLAND CEMENT ASSOCIATION.

2. The Association is formed for the purpose of discussing the various questions of interest to the industry arising from time to time, and to exchange views as to the best method of manufacturing, extending, developing and conducting the

business, and to do all things incidental and conducive to the attainment of the above objects.

3. The business office of the Association shall be at the office of the Secretary of the Association.

4. The management of the Association shall be vested in an Executive Committee consisting of nineteen members, viz: The President, two Vice-Presidents, the Treasurer, and fifteen other members of the Association, but this number may be increased by such other members and such other officers as the Association may from time to time appoint by an amendment to its By-Laws.

5. The Association has no Capital Stock, and the members thereof shall be composed of the subscribers and their associates and of such persons as may from time to time be admitted by vote in such manner and upon such requirements as may be prescribed by the By-Laws. The Association shall, nevertheless, have power to exclude, expel or suspend members for just or legal cause subversive of the best interests and [610] morals of the business, and in such legal manner as may be ordained and directed by the By-Laws.

6. The By-Laws of the Association shall be admitted and taken to be its laws subordinate to this Constitution and the Constitution of the United States; they shall be altered and amended as provided for by the By-Laws themselves, and shall prescribe the powers and functions of the Executive Committee herein mentioned and those to be hereafter elected, the times and places of meetings of the Committee and this Association, the number of

members who shall constitute a quorum at the meetings of the Association and of the Committee, the qualifications and manner of electing members, the manner of electing officers, and the powers and duties of such officers, and all others concerned, and all internal arrangements of the said Association.

7. Proposed amendments to the Constitution signed by at least three (3) members must be presented in writing to the Executive Committee at least two (2) weeks before the next meeting of the Association. In the notices of this meeting the proposed amendment or amendments shall be presented. At the meeting, the proposed amendment or amendments may be discussed and amended. They shall then be sent out to letter ballot. If two-thirds of the total membership as signified by letter ballot are in favor of the amendment or amendments, it or they shall be adopted.

## BY-LAWS.

### Article I.

#### Members.

Section 1. Any corporation, firm or individual engaged in the manufacture of Portland cement in the United States or Canada [611] is eligible for membership.

Section 2. Any corporation, firm or individual engaged in the manufacture of Portland cement outside of the United States or Canada is eligible for Foreign Membership. Foreign Membership entitles the holder to all the privileges of the Association with the exception of voting and holding office.

Sec. 3. Any individual having been actively engaged in the manufacture of Portland cement may be elected to Honorary Membership by the Executive Committee. Honorary Membership entitles the holder to all privileges of the Association without dues, with the exception of voting and holding office.

Sec. 4. Any corporation, firm or individual, as above limited, can become a member of the Association upon being proposed by two members of the Association and being elected by a majority of the Executive Committee.

Sec. 5. Applications for membership and resignations from membership must be transmitted in writing to the Secretary.

## Article II.

### Officers and Their Elections.

Section 1. The Officers shall be a President, two Vice-Presidents, Secretary, Assistant Secretary, Treasurer and Assistant Treasurer.

Section 2. These Officers, except the Secretary, Assistant Secretary and Assistant Treasurer, shall be elected by ballot at the annual meeting of the Association in December and shall hold office for one year or until their successors are duly elected.

The Secretary, Assistant Secretary and Assistant Treasurer shall be elected by the Executive Committee.

Section 3. The Executive Committee shall consist [612] of the President, two Vice-Presidents and Treasurer and fifteen members, being elected by ballot at each annual meeting in December.



A majority of the Committee shall constitute a quorum.

Sec. 4. The salaries of the officers and all employees of the Association shall be fixed by the Executive Committee.

Sec. 5. The President, Vice-President and Treasurer and members of the Executive Committee, elected under these By-Laws, shall serve for their respective terms to which they have been duly elected, or until their successors have been duly elected.

Sec. 6. The Executive Committee shall have the power to fill any vacancies occurring in their number by death, resignation, or otherwise, and to appoint such committees as may be necessary to carry out the objects of this Association. They shall also fill vacancies in the general offices.

Sec. 7. At all meetings each membership shall have a vote.

Sec. 8. Except the Secretary, Assistant Secretary and Assistant Treasurer, the election of officers and members of the Executive Committee shall be by ballot. The Executive Committee, before each annual meeting, shall appoint a Nominating Committee of five, from members of the Association, not members of its own body, whose duty it shall be to nominate a full list of officers. The list of nominations so made shall be submitted to the membership not more than eight (8) weeks, nor less than four (4) weeks before the coming annual meeting.

Further nominations signed by at least five members may be submitted to the Secretary in writing

at least two (2) [613] weeks before the annual meeting, and such nominations shall also be submitted to the membership on the official ballot.

### Article III.

#### Duties of Officers.

##### President.

Section 1. It shall be the duty of the President to preside at all meetings of the Association and of the Executive Committee. He shall himself be ex-officio a member of all committees. He shall sign all orders on the Treasury for the payment of money; he shall see to the enforcement of the By-Laws, and shall carry into execution all resolutions of the Association and of the Executive Committee.

The President may call a meeting of the Executive Committee at any time.

##### Vice-Presidents.

Section 2. The Vice-Presidents shall, in the event of the death, resignation, disability or absence of the President, perform all the duties of said officer.

##### Secretary.

Sec. 3. It shall be the duty of the Secretary to give notice of all meetings of the Association and of the Executive Committee; to keep a record of all proceedings had at such meetings; to preserve all communications received by him pertaining to the affairs of the Association; to draw and attest all orders on the Treasurer; to keep a roll of the members of the Association; and to perform such other duties as usually pertain to the office of Secretary,

or as the Association or Executive Committee may require.

#### Treasurer.

Sec. 4. The Treasurer shall receive and collect the dues of the members and all other moneys otherwise belonging to the Association, and shall deposit the same in a depository [614] to be designated by the Executive Committee. He shall pay out such moneys only upon the order of the President, attested by the Secretary, and shall preserve the proper vouchers for all payments so made. He shall keep proper books of account, which shall be open at all times to the inspection of the Executive Committee, and at the close of his term of office he shall deliver to his successor all moneys, books, papers and other valuables belonging to the Association, which shall be in his custody or possession.

#### Article IV.

##### Meetings.

Section 1. The annual meeting of the Association shall be held on the second Wednesday in December. The place for holding the Annual Meeting and the time and place for holding the other regular meetings shall be fixed by the Executive Committee.

Sec. 2. Special meetings may be called whenever the Executive Committee shall deem it necessary, or upon the request in writing, to the President, of five (5) members.

Sec. 3. A majority of all the members shall constitute a quorum.

Sec. 4. Order of business:

Roll call.

Minutes of last meeting shall be read.

Reports of officers.

Reports of committees.

Unfinished business.

New business. [615]

Article V.

Dues.

Section 1. The fiscal year shall begin on the first day of January, and dues shall be payable quarterly in advance on the first day of January, April, July and October.

Sec. 2. The annual dues of each member shall be two and one-half mills per barrel of cement produced during the second preceding calendar year, provided that the annual dues of any member shall not be less than \$200.

(Amended May 10, 1916.)

The annual dues of each member shall be seven and one-half mills per barrel of cement produced during the second preceding calendar year, provided that the annual dues of any member shall not be less than \$200.

Sec. 3. The annual dues of each foreign member shall be one-half of those paid by a member.

(Amended May 10, 1916.)

The annual dues of each foreign member shall be two and one-half mills per barrel of cement produced during the second preceding calendar year, provided that the annual dues of any foreign member shall not be less than \$200.



Sec. 4. Any member of the Association whose dues shall remain unpaid for a period of three (3) months shall forfeit the privilege of membership. If such member neglects to pay the dues within thirty (30) days thereafter and after notification [616] from the Secretary, the name of such member may be stricken from the roll of membership by the Executive Committee.

#### Article VI.

##### Discipline of Members.

Any member may be suspended or expelled for causes by a vote of three-fourths of all the members of the Association, as expressed by secret ballot, and upon charges preferred by the Executive Committee, one month's previous notice in writing having been given to the member with a copy of the charges preferred against him.

#### Article VII.

##### Amendments.

Section 1. Proposed amendments to these By-Laws, signed by at least three (3) members, must be presented in writing to the Executive Committee at least four weeks before the next meeting of the Association. In the notices of this meeting, the proposed amendment shall be printed. At meeting, the proposed amendment may be discussed and adopted by a two-thirds vote of those present, but, if amended, it shall be passed to letter ballot. If two-thirds of the vote obtained by letter ballot are in favor of the proposed amendment, as amended, it shall be adopted.

Sec. 2. The Executive Committee is authorized to number articles and sections of the By-Laws to correspond with any changes that may be made.

Filed December 23, 1920. G. H. Marsh, Clerk. [617]

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**Defendants' Exhibit No. 2.**

Oswego, Oregon, May 13, 1915.

Mr. R. P. Butchart,  
Tod Inlet, B. C.

Dear Mr. Butchart:

Yours of May 10th and May 11th received; also the ck for \$2000.00 which will be sufficient to tide matters over until reorganization is completed. Many thanks for your promptness. Mr. Cotton has been out of city and will not return until Saturday. Mr. Johnson in office of Teal & Minor, is at work on papers for incorporating Oregon Portland Cement Co. and papers will be ready to submit to Mr. Cotton on Saturday. The incorporating papers previously submitted by Mr. Boettcher will be followed as closely as possible. They should be ready to file by Tuesday or Wednesday of next week. It now looks as though we can incorporate under laws of the State of Washington as advantageously as the State of West Virginia and save both time and expense in case we would have to take a street car from Portland to Vancouver, Wash., once a year to hold our stockholders meetings but that is only 30 minutes ride and no great objection. I wrote your brother to ascertain if he were in a position to come

here and suggested to him that if so I would forward *all* our eastern contracts to him and have him call personally at New York to see F. T. Smidth & Co., Wilkesbarre, Pa., to see Vulcan Iron Wks., also Caldwell in Chicago. We desire some cancellations of equipments in all of these contracts and thought it would be most satisfactory to have it done by your brother through personal interview rather than by correspondence. Hope to hear from your brother within next few days. If you prefer I will forward the contracts to you explaining just what cancellations and [618] modifications we desire and you can then approve same before forwarding to your brother.

Note that you forwarded Oreg. Iron & Steel Contract to Mr. Boettcher and expect to receive his check within a few days. The local people are all paying in but some are always slow and I am expecting to have them all in by end of week. Shall execute note tomorrow to cover the \$2000.00 and will forward same to you with assignment to Ladd & Tilton Bank. You can then write them enclosing note and assignment requesting them to deduct the \$2000.00 together with the \$1050.00 note and assignment they already hold, from your second call, or rather you can deduct same and request them to hold notes and assignments to apply on 2d call under reorganization call. Your reply from them will then serve as a receipt to you. Will deposit the \$12,000.00 additional bonds as security to you personally with Ladd & Tilton to be held as security for you until reorganization is completed.

Will forward incorporation papers to you for your approval before filing.

Am doing all I can to have the County Commissioners of Multnomah County use concrete for the 70 miles of pavement. Have injected the element of Home industry which is a big factor. Do you know of some good responsible contractor there who would come here to bid on work? We should have somebody we can depend upon to give us order for cement at price made now confidentially to him before contract is awarded. Have written Pat Moran of Sale Lake City, Utah, who is a big contractor there as well as Pres. of Port. Cem. Co. of Utah. Will know in a few days more whether he can come or not.

Sincerely yours,

AMAN MOORE.

Filed December 23, 1920. G. H. Marsh, Clerk.  
[619]

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**Defendants' Exhibit No. 3.**

**PORTLAND CEMENT CO.**

Main Office: 1402-3 Yeon Building,  
Portland, Oregon.

Factory: Oswego, Oregon.

Oswego, Ore., May 16, 1915.

Mr. R. P. Butchart,

Tod Inlet, B. C.

Dear Mr. Butchart:

Yours of 14th inst. from Seattle received this morning. In reference to the pavement matter



Mr. Coats has been grossly misinformed, no doubt, by his local agent Mr. Nickerson. The talk I made to the Commissioners was made at an open session, with all three commissioners present and probably 30 others including contractors and others interested in the proposed paving. I had, just prior to meeting, introduced myself to Mr. Holbrook who was the first commissioner to arrive and had been requested by the commissioners to make the talk. I urged upon them 1st the durability of concrete vs. Bitumen. 2d The unfairness of permitting 2" Bitumen to compete on same basis as 6" concrete and 3d the question of Home Industry and retaining money within the State of Oregon, etc. I did state that the question of "Cement Trust" which the Evening Telegram was injecting into the proposition in order to support its unjust fight for Warrenite was a myth and that certainly our own plant in which approx. 200 stockholders residing in Portland and Oregon, were no parties to a cement trust which did not exist. I also advised them that while no definite statement or commitment was intended relating to price that I was sure they could depend upon prices being such that contractors could construct concrete [620] pavement at approx. the amount of estimate by commissioners i. e. \$1.20 per sq. yd. Also that the cement plants of Calif. for State roads had during past years made a special *Mill* price of \$1.50 (this is public property and commissioners were already aware of fact) I made no statement other than a diplomatic presentation against the possibility of

a "cement trust," knowing that we must deal with contractors who contemplate bidding on the work and if any reductions were to be made it would be secretly and in strict co-operation with one or more contractors before bids are filed. I had previously approached Nickerson (Coats salesman), and had asked him frankly where we were to participate—if they would divide order—they furnishing until our plant was producing and we to furnish balance. Mr. Nickerson seemed greatly chagrined to think we should want any part of business—tried to scare me off by stating Washington plants were willing to furnish at an actual loss of 20¢ per bbl. in order to beat Bitumen gang on these roads—that they would deliver @ 1.12 per bbl. if necessary—that it would be fine and proper for our plant to furnish instead of Wash. as we could do so at cost or a little less and thus save loss to them. I informed him, that while you were the one who would have to pass on such important matters, yet I felt sure we would want *no* business without profit and furthermore advised that if any cutting should be done we would have to be very careful so as to get every cent possible out of the job and that I hoped that we would be able to realize \$1.75 f. o. b. Portland. Nickerson answered that this would be impossible as price would certainly have to go below \$1.50.

I was also informed by Nickerson that their employed engineer Mr. Ritzie was on the ground conducting the campaign for Wash. plants jointly and that the expense was being paid by [621]

the Wash. mills. I told him I was quite sure that if our company participated in the order we would be quite willing to stand our part of Ritzie's expense. I then urged on Nickerson the necessity for local enlightenment on concrete vs. Bitumen pavements. I had learned that 90% of local people favored Bitumen because they had been educated by years of intelligent advertising, by retainers to many of the best legal firms in Portland, by political pull, by influence of other paving companies (formerly asphalt) with several of the Portland banks—all these factors together with constant and systematic publicity through the local papers had molded public sentiment against concrete and in favor of Bitumen—especially when Portland did not have any first class *Concrete* pavements but did have several miles of *very* poor *Hassam* which local people took as a fair example of *concrete*. I urged the necessity of enlightenment of the public, but was informed by Nickerson that they were running their own campaign, did not desire any suggestions and in fact he became so undignified to think that I would want to even discuss the matter of our participating in either the campaign or the cement order that I left him stating that I would do what I could independently but assured him would do nothing except in co-operation with Mr. Burch, Pres. of Beaver Portland Cement Co. of Gold Hill who I believe has done more already than Nickerson, Ritzie and all the others combined to show up the real merits of concrete pavement. After this break with Nickerson I have been work-

ing closely with Mr. Burch in an endeavor to enlighten the local people I had found that the authorities of the Portland Chamber of Commerce had appointed a committee of 3 who were unanimously against concrete also Messrs. Teal, Cotton, Ladd, Mills, Ainsworth and nearly all of our own stockholders honestly believed Bitumen pavement was far superior to concrete. This sentiment was almost unanimously held by all [622] the most influential men of Portland and especially the largest tax-payers. I have found them open to reason—their convictions were honest and I am securing the necessary data and facts from the east & middle west where concrete has recently been substituted for Bitumen and Mr. Teal has promised to act for us in behalf of concrete, with the local interests, when the facts and data are before him to substantiate my statements.

I have written contractors in several cities including Pat Moran of Salt Lake City, also have written Mr. Leonardt of Los Angeles urging them to come here and bid on the work. Have also written Mr. Morse in Denver to see if he can induce a good contractor from there to come here to bid on work. Am convinced that we should name no price to anybody except a party or parties on whom we can absolutely rely upon to keep the price in strict confidence. We cannot get order for cement unless we have a contractor on whom we can absolutely rely upon secure the contract. I am convinced the contract can be secured in competition with Bitumen and on a basis such that



a *fair* price can be paid for the Portland cement and still net the contractor a profit of from \$100,000 to \$200,000.00. If I were foot-loose myself and had my own capital available for operating capital I would not hesitate to bid in the work, but with my time taken in collecting in subscriptions, repairing incorporation papers for reorganization, answering correspondence and personal worries, I have not been able to give as much time to this matter as I would like to do, i. e., collecting data as to cost & kind of rock, sand, water, sub-drainage, excavation, length of haul for rock, cement, sand, and all such matters entering into the construction. Do you not have [623] some absolutely reliable contractor who would come here and bid on the work and if not do you not think your brother could secure one in Toronto. Being over a million dollar contract it ought to invite contractors from far and near.

Sincerely yours,

AMAN MOORE.

P. S.—Expect Mr. Hunt here very shortly, when we can take up matter of sacks.

Filed December 23, 1919. G. H. Marsh, Clerk.  
[624]

**Defendants' Exhibit No. 4.**

PORTLAND CEMENT CO.

Main Office: 1402-3 Yeon Building,  
Portland, Oregon.

Factory: Oswego, Oregon.

Oswego, Oreg. May 17, 1915.

Dear Mr. Butchart:

Have just received the enclosed wire from Mr. Moran of Salt Lake City, who is one of the most successful paving contractors in the West as well as President of Port. Cement Co. of Utah. We can safely tie up to him and I have urged him to come on to bid on the work. He is absolutely safe, financially & otherwise. Kindly return his telegram after reading. Will make no commitment on price until after consulting you and then only after Moran has estimated all other costs, etc.

After he has every thing in shape shall probably request you to meet him personally either at Seattle or Victoria to settle matter of price with him and to meet him personally. If we secure order on price named to him, we would of course have to begin deliveries within a week or two. You could either supply from Victoria plant or arrange with Mr. Coats to supply from his plant, as you might desire. Have only 3 local people left to pay in the 50% (R. P. B.) and these have promised within day or two. Cotton is in his office today and at conference it was decided to incorporate under laws of Utah instead of Washington as the latter states requires one resident director, which we do not have

and also requires a *majority* of directors to make a quorum which we could not do with so many directors residing away. In Utah  $\frac{1}{4}$  of directors may constitute a quorum and we will have one resident director there. Mr. C. W. Nibley. We can also elect directors for three years in Utah instead of one. Kindly advise if the following board will meet your approval. [625]

3 year terms R. P. Butchart, C. Boettcher, Aman Moore.

2 year terms A. S. Butchart, A. C. Smith, C. W. Nibley.

1 year terms T. B. Wilcox, C. Leonardt and either  
Teal )  
Cotton) ?  
Minor )

one of these three to be decided upon to serve on our board as advising attorney.

We will not be able to provide for the exclusion of Preference shares from voting as all shares must vote on equal terms—which is only fair to the Preference share holders. We cannot provide for retiring of Preference shares except by consent of share holders.

Mr. Cotton wire to Salt Lake for complete laws for incorporation work which should be mailed from there today and received here Wednesday. It will not take long to complete work after these papers arrive.

Sincerely yours.

AMAN MOORE.

P. S.—Have your note executed and will try to have copy of assignment ready to mail you tomorrow.

Filed December 23, 1920. G. H. Marsh, Clerk.  
[626]

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**Defendant's Exhibit No. 5.**

Oswego, Oreg., June 9, 1915.

Mr. R. P. Butchart,  
Tod Inlet, B. C.

Dear Mr. Butchart:

The Ladd Bank received wire from Utah bank today at 3 P. M. advising draft had been paid. Tomorrow the bank will check over payments and advise you of same.

Referring to your letter of 8th received this morning, I am very sorry if you have misunderstood the intent of my former letter. The position of the Ladd Bank is one of Trustee for all old, new and holders under plan of reorganization. It is not a question of doubt as to payment of anybody's checks but purely a technical point as they see it, in compelling them to follow plan of reorganization, without any changes. If your checks are sent to be held by bank they cannot be counted as *paid* as required by reorganization plan. This plan however provides that 25% must be *paid in* therefore you could send your checks as desired by you, since you have already paid in first 25% excepting check of Cox Estate, check for which has already been returned to Toronto. If however Mr. Boettcher should fail to pay up his 50%—25% of which or one half amount must be absolutely *paid in* without any conditions whatever



attached before anything further can be done to carry out reorganization plan—then it would become necessary for you to release any conditions which you might place on your checks, having 50% actually *paid in* bank before M. Boettcher would become legally binding under his letter to you dated last June (just a year ago today). You could then release condition about holding checks permitting them to be collected with condition that all monies *paid in* by you should be returned to you after 60 days unless 50% of the total of \$360,000.00 had been paid [627] in. Now I hope I have made clear so that there will be no further misunderstanding. It is all technical points raised 1st to legalize reorganization and not to compel Ladd bank to violate terms thereof and 2d to legalize Mr. Boettcher's commitment in event he should fail to make payment after being advised that all others excepting you and he have paid in 50% and that your checks are in Ladd bank to cover 2d 25% payment, after he has made his payment of 50%.

Now in regard to advancing additional amount of cash. I only intended to hurry matters by suggesting that if you desire to send sufficient amount to cover back taxes approx. \$3500.00 I could go personally to the four county seats and pay these taxes and thereby save a week's time also stop expense of 15% we have to pay as a penalty for unpaid taxes. Also that I could and would have the County Clerks receipt these tax payments directly to you to be held by you as security until new

company funds were available. Also that these tax receipts were a first lien on our properties, real estate etc. and as such would take precedence over bonds outstanding. It is not imperative that these taxes be paid immediately but if you desire to do so I would have time now, while waiting for Mr. Boettcher to attend to it and thereby save time and annoyance later on, also, would stop the 15% interest on the amount.

If you prefer to postpone this matter as I would infer from your letter, will not urge the matter further. Regarding balance of funds I am now informed that we may have to legalize the old cement Securities Co. as well as O. D. & R. Ry. In that event the 2000.00 you advance will be short from \$600.00 to \$750.00 to tide matters over in the completing of reorganization. I had suggested that you advance another \$1000.00 to cover [628] this item but if you do not care to do so, I will try and cover it somehow, even though I may have to mortgage personal effects to do so.

I received your wire today regarding possible cement delivery. When I showed this wire to Mr. Moran he was so disappointed, that he did not put in a bid on the paving and will return to Salt Lake tomorrow morning. I do not think his disappointment was altogether due to our failure to quote price of less than \$1.75 to him as both Mr. Coats and Eden were with Mr. Moran and myself at Benson Hotel last evening and he seemed satisfied with the 1.75 price, with the assurance of Messrs. Coats & Eden that no other contractors

had a lower price. He was quite disturbed over the 10 yr. guarantee for maintenance as required and no bonding companies would execute bond for maintenance over 5 yrs.

The bids we opened at 11 A. M. and it took all day to tabulate and read bids. It will be a day or so before we will know whether contract will go to concrete or Bitumen.

I am returning stock subscription for you to sign and immediately return. This \$100.00 becomes a part of your present subscription which cannot be counted under plan of reorganization until 25% of total of 360,000.00 is paid into bank. Furthermore it becomes necessary for each *director* to sign one share before we can file papers and elect directors as incorporators. Each director must have signed for one share before he is qualified to act as a director. It therefore becomes absolutely necessary to have yourself and each of the other new directors sign for one share before our attorneys can make any further progress. It will only require a few days to complete incorporation and organization of new company after each director has signed for one share of stock as provided in this subscription paper.

Kindly return to me after signing as I desire to have Mr. [629] C. W. Nibley of Salt Lake City sign while here on Sat. Sun & Monday next. After I secure his signature will then forward to your brother at Toronto.

Sincerely yours,

AMAN MOORE.

Filed December 23, 1920. G. H. Marsh, Clerk.  
[630]

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**Defendants' Exhibit No. 6.**

In the Circuit Court of the State of Oregon for the  
County of Multnomah.

OREGON PORTLAND CEMENT COMPANY, a  
Corporation, AMAN MOORE on Behalf of  
Himself and Other Stockholders as Herein-  
after Set Out,

Plaintiffs,

vs.

PACIFIC PORTLAND CEMENT COMPANY, a  
Corporation, STANDARD PORTLAND  
CEMENT COMPANY, a Corporation,  
SANTA CRUZ PORTLAND CEMENT  
COMPANY, a Corporation, HENRY COW-  
ELL LIME and CEMENT COMPANY, a  
Corporation, SUPERIOR PORTLAND  
CEMENT COMPANY, a Corporation,  
WASHINGTON PORTLAND CEMENT  
COMPANY, a Corporation, OLYMPIC  
PORTLAND CEMENT COMPANY, a  
Corporation, INTERNATIONAL PORT-  
LAND CEMENT COMPANY, a Corpora-  
tion, LEHIGH PORTLAND CEMENT  
COMPANY, a Corporation, THREE  
FORKS PORTLAND CEMENT COM-  
PANY, a Corporation, UNION PORT-  
LAND CEMENT COMPANY, a Corpora-



tion, CEMENT SECURITIES COMPANY,  
a Corporation, COLORADO PORTLAND  
CEMENT COMPANY, a Corporation,  
RIVERSIDE PORTLAND CEMENT  
COMPANY, a Corporation, CLARKE M.  
MOORE, R. P. BUTCHART, ANDREW  
C. SMITH, PAUL C. BATES, WIRT  
MINOR, WILLIAM JOHNSON, M. J.  
BALLARD, L. C. NEWLANDS, J. G. WIL-  
SON, CHARLES BOETTCHER, and  
GEORGE MACDONALD,

Defendants.

### COMPLAINT.

Plaintiffs allege:

#### I.

That Oregon Portland Cement Company is a corporation organized and existing under the laws of the State of Nevada and conducting a business within the State of Oregon at the city of Portland therein, and at the town of Oswego, and owning properties at various places within the state of Oregon.

#### II.

That Oregon Portland Cement Company was incorporated for the purpose of, and under its articles of incorporation is authorized, to engage in the business of quarrying limestone, cement operating tramways and railroads and manufacturing and selling Portland cement, and that its properties are located in [631] Clackamas County, Oregon, Polk County, Oregon, Douglas County, Oregon, and Sherman County, Oregon, and its

properties are now operating and it is producing, manufacturing and preparing to sell and selling Portland cement.

### III.

That Pacific Portland Cement Company is a corporation organized and doing business under the laws of the State of Washington with its principal place of business at Seattle.

### IV.

That Standard Portland Cement Company is a corporation organized and doing business under the laws of the State of California with its principal place of business at San Francisco.

### V.

That Santa Cruz Portland Cement Company is a corporation organized and doing business under the laws of the State of California with its principal place of business at San Francisco.

### VI.

That Henry Cowell Lime and Cement Company is a corporation organized and doing business under the laws of the State of California with its principal place of business at San Francisco.

### VII.

That Superior Portland Cement Company is a corporation organized and doing business under the laws of the State of Washington with its principal place of business at Seattle.

### VIII.

That Washington Portland Cement Company is a corporation *organization* and doing business

under the laws of the State of Washington with its principal place of business at Seattle.

IX.

That Olympic Portland Cement Company is a corporation organized and doing business under the laws of the State of [632] Washington with its principal place of business at Seattle.

X.

That International Portland Cement Company is a corporation organized and doing business under the laws of the State of Washington with its principal place of business at Spokane.

XI.

That Lehigh Portland Cement Company is a corporation organized and doing business under the laws of the State of Pennsylvania with its principal place of business at Allentown.

XII.

That Three Forks Portland Cement Company is a corporation organized and doing business under the laws of the State of Montana with its principal place of business at Butte.

XIII.

That Union Portland Cement Company is a corporation organized and doing business under the laws of the State of Utah with its principal place of business at Ogden.

XIV.

That Cement Securities Company is a corporation organized and doing business under the laws of the State of Colorado with its principal place of business at Denver.

## XV.

That Riverside Portland Cement Company is a corporation organized and doing business under the laws of the State of California with its principal place of business at San Francisco.

## XVI.

That Clark M. Moore is an officer and agent of Oregon Portland Cement Company; that George McDonald is an officer and agent of Oregon Portland Cement Company; that R. P. Butchart, Andrew C. Smith, Paul C. Bates, Wirt Minor, William [633] Johnson, M. J. Ballard, L. C. Newlands and J. G. Wilson are each of them directors or Oregon Portland Cement Company.

## XVII.

That Pacific Portland Cement Company and Standard Portland Cement Company and Santa Cruz Portland Cement Company, and Henry Cowell Lime and Cement Company, and Superior Portland Cement Company, and Washington Portland Cement Company, and Olympic Portland Cement Company and International Portland Cement Company, and Lehigh Portland Cement Company, and Three Forks Portland Cement Company, and Union Portland Cement Company, and Colorado Portland Cement Company, are each of them companies which are authorized, and are engaged in, the business of manufacturing and selling Portland cement, and are conducting their business at the various principal places of business as hereinbefore set out, and that the business of these companies is naturally and if uninterrupted in direct competition with the business of Oregon



Portland Cement Company, and the business of each of said companies is naturally and logically competitive.

### XVIII.

That Aman Moore is a stockholder in Oregon Portland Cement Company and is vice-president and treasurer of that company and was the person who promoted the incorporation of Oregon Portland Cement Company, and on behalf of that company secured subscriptions to the capital stock of that company in the amount of 8742 shares of preferred stock and 6024 shares of common stock, together with some seventy or eighty additional shares, from various subscribers who are now stockholders, and that the various subscriptions hereinbefore mentioned were obtained by Aman Moore upon representations [634] made on behalf of the Company, and with its knowledge, to the effect that Oregon Portland Cement Company was to conduct its business as an independent plant and in competition with all other companies which might desire to compete, and that the Oregon Portland Cement Company would make no agreements restricting its output or restricting its territory for sales, and at the time of the incorporation of Oregon Portland Cement Company on behalf of all the stockholders as a safeguard against the control of the corporation being secured or exercised on behalf of any competing company the articles of incorporation were made to provide for an executive committee of three persons whose duty it was to represent the stockholders and to be constantly and actively in touch with the business

of Oregon Portland Cement Company, and in the by-laws adopted by the corporation provision was made for an executive committee.

### XIX.

That Oregon Portland Cement Company is the only company manufacturing Portland cement in the State of Oregon, and by reason of lesser freights is able to reach more cheaply Oregon points and southwestern Washington points than any other cement company, and the dealers at various points within said territories who are the handlers of Portland cement are fully cognizant of the fact that Oregon Portland Cement Company is able to at a lesser figure deliver to them cement, and Aman Moore acting on behalf of Oregon Portland Cement Company as its vice-president has for the last several years diligently spread among the dealers and people in the said territory the fact that Oregon Portland Cement Company could deliver to dealers an Oregon product at a lesser cost than other competing companies under fair competitive conditions, and there exists among the people and the dealers in said territories a [635] belief that the Portland Cement Companies generally are combined and exercise joint supervision and control over all sales made, whether made by one company or another, and Aman Moore on behalf of Oregon Portland Cement Company has created a goodwill of great value to Oregon Portland Cement Company by representations that Oregon Portland Cement Company would not combine with any other Portland Cement Company or with any other corporation for the purpose of restricting output,

reducing or eliminating competition, or for any purpose in anywise affecting the sales of Portland cement, and that these representations at all times have been known to the stockholders and directors of Oregon Portland Cement Company, have been made with their approval and under their authority and ratified by them.

## XX.

That notwithstanding the purpose of the incorporation of the company, and notwithstanding the clearly illegal nature of their operations, in some manner unknown to the plaintiffs, Pacific Portland Cement Company, Standard Portland Cement Company, Santa Cruz Portland Cement Company, Henry Cowell Lime and Cement Company, Superior Portland Cement Company, Washington Portland Cement Company, Olympic Portland Cement Company, International Portland Cement Company, Lehigh Portland Cement Company, Three Forks Portland Cement Company, Union Portland Cement Company, Cement Securities Company and Colorado Portland Cement Company, together with Charles Boettcher, Clark M. Moore, R. P. Butchart, Wirt Minor, William Johnson, M. J. Ballard, L. C. Newlands and George McDonald, have secured control of Oregon Portland Cement Company, and said parties are now controlling the majority of the directors [636] of Oregon Portland Cement Company, and that the said Pacific Portland Cement Company, Standard Portland Cement Company, Santa Cruz Portland Cement Company, Henry Cowell Lime and Cement Company,

Superior Portland Cement Company, Washington Portland Cement Company, Olympic Portland Cement Company, International Portland Cement Company, Lehigh Portland Cement Company, Three Forks Portland Cement Company, Union Portland Cement Company, Cement Securities Company and Colorado Portland Cement Company, together with Charles Boettcher, Clark M. Moore, R. P. Butchart, Wirt Minor, William Johnson, M. J. Ballard, L. C. Newland and George McDonald, have effected and obtained such control because of and as a result of a conspiracy on the part of each of said corporations and persons for the purport of restricting the output of Oregon Portland Cement Company and for the purpose of forcing Oregon Portland Cement Company to charge for its products a rate to be fixed by said defendants, and to the total disregard of the best interests of Oregon Portland Cement Company; and said Pacific Portland Cement Company, Standard Portland Cement Company, Santa Cruz Portland Cement Company, Henry Cowell Lime and Cement Company, Superior Portland Cement Company, Washington Portland Cement Company, Olympic Portland Cement Company, International Portland Cement Company, Lehigh Portland Cement Company, Three Forks Portland Cement Company, Union Portland Cement Company, Cement Securities Company and Colorado Portland Cement Company, together with Charles Boettcher, Clark M. Moore, R. P. Butchart, Wirt Minor, William Johnson, M. J. Ballard, L. C. Newlands and George McDonald, in pursuance



of their conspiracy, have agreed amongst themselves that Orgeon Portland Cement Company shall not ship or sell Portland cement except in certain territory, and that in all other territory one of the other cement companies [637] defendant herein shall have the preference, in that if Oregon Portland Cement Company should quote in any territory aside from that allotted to it prices upon cement that the same should be quoted at a rate satisfactory to said other cement companies.

## XXI.

That in pursuance of this understanding and conspiracy alleged to have been participated in by all the defendants herein except Andrew C. Smith, Paul C. Bates and J. G. Wilson, said defendants have now combined in the form of a trust and a conspiracy in restraint of trade and commerce among the several states, and the Portland cement trade between the states of Oregon, Washington, Idaho, Montana, California, Nevada, Utah, Colorado and the Dominion of Canada, particularly British Columbia, is controlled by said defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, and said defendants and all of the defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, are restricting the trade in Portland cement by preventing the shipment from one of the states above mentioned to the other of Oregon Portland cement, and are controlling the output of cement in the states above mentioned, and are regulating the price at which Portland cement must be sold in the above states, and that to carry out their

said conspiracy said defendants and all of the defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, did on the third day of June, 1916, prepare a notice calling a special meeting of the board of directors of Oregon Portland Cement Company to be held in Portland, Oregon, at the hour of twelve o'clock noon, on Saturday, June 10, 1916, and said defendants and all of the defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, caused notice to be given that at that place the by-laws of Oregon Portland Cement Company would be by [638] them amended in such manner as to eliminate the executive committee and thus place the entire control of the company in the hands of the directors, and also to place with the defendants R. P. Butchart, L. C. Newlands, Clark M. Moore, and George McDonald the complete control of this company; that Clark M. Moore, George McDonald and L. C. Newlands are the agents and confidential employees of R. P. Butchart and are dominated and controlled by said Butchart and were by said Butchart placed with Oregon Portland Cement Company as follows: George McDonald secretary, L. C. Newlands director and superintendent, and Clark M. Moore sales manager, for the sole purpose of placing the control of said Oregon Portland Cement Company in the sole hands and control of said R. P. Butchart; and that said R. P. Butchart is interested in and a heavy stockholder of Washington Portland Cement Company, one of the defendant Companies herein, and is the managing direc-

tor and in charge and control of the business of Vancouver Portland Cement Company, a cement company whose principal offices are at Victoria, British Columbia, Dominion of Canada; that the business of Vancouver Portland Cement Company, originally and naturally, and if uninterrupted by trade agreements, would be in competition with the business of Oregon Portland Cement Company and the other defendant companies hereinbefore mentioned, and it is alleged that said R. P. Butchart, because of his financial interest in Washington Portland Cement Company, Vancouver Portland Cement Company, and because of his affiliations through trade agreements to restrict competition, with all the other defendants herein, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, is incompetent, disqualified and an improper person to handle or conduct the affairs of Oregon Portland Cement Company, and while in control within the [639] past month has controlled the business of Oregon Portland Cement Company for the benefit of the other defendant companies hereinbefore mentioned, and has restricted its business and output, and has quoted prices at Seattle, Washington, of \$2.18 per barrel net, which is a price eighteen cents per barrel higher than the prices fixed for said Seattle, Washington, by the other defendant companies herein, and upon the 29th day of May, 1916, the defendants, except Andrew C. Smith, Paul C. Bates, and J. G. Wilson, agreed that Oregon Portland Cement Company should

sell its product for, and not be allowed to charge more or less than, the following schedule, to wit:

“To Dealers:

\$2.30 per barrel gross f. o. b. the cars on the terminal team track of any of the steam railroads, or f. o. b. cars at the dealers warehouse spur buying the cement, Or ex dock,

\$2.35 per barrel gross f. o. b. any other spur within the city limits of Portland.

Less 10¢ per barrel dealers commission.

To Consumers:

\$2.30 per barrel f. o. b. the dock of f. o. b. the cars at the team track of any of the steam railroads,

\$2.35 per barrel in load lots, minimum of 15 barrels delivered anywhere within the following district:

On the West side of the river beginning at the North end of 16th street, extending South to Hall Street, and from 16th and Hall streets to the river. On the East side at a point commencing where Division Street would start from the river east to 12th street and North on 12th street to Russel, and west again on Russel street to where it would connect with the river. [640]

Both side of the streets above mentioned to be within the \$2.35 haul.

All other delivery points within the city limits of Portland to be \$2.45 per barrel delivered, minimum of not less than 15 barrels.”

The above schedule by the agreement aforementioned to control Oregon Portland Cement Company as to Portland, Oregon, business and business



outside of Portland, Oregon, within its allotted territory, should follow the above schedule with the additional cost of transportation and delivery from Portland, Oregon.

## XXII.

That the reasonable, legitimate cost to Oregon Portland Cement Company of manufacturing cement and delivering the same at Portland, Oregon, is \$1.25 per barrel, to which should be added a legitimate profit of forty cents per barrel, and Oregon Portland Cement Company if not controlled by outside influence could profitably produce and deliver Portland cement of first class quality at \$1.65 per barrel, and at all times within the control of Oregon Portland Cement Company was surreptitiously obtained by the defendants herein, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, it was the contemplation to make the price of its cement not to exceed \$1.65 per barrel at Portland.

## XXIII.

That in pursuance of said conspiracy of the defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, Clark M. Moore has been empowered to act as the sales manager of Oregon Portland Cement Company and said Clark M. Moore at the same time is the sales manager and connected with the sales department of those companies controlled by the Cement Securities Company of Denver, [641] Colorado, including the Colorado Portland Cement Company, Union Portland Cement Company and Three Forks Portland Cement Company, and said Clark M. Moore, al-

though empowered to act for Oregon Portland Cement Company, in fact is acting on behalf of the combined defendants and is incompetent and disqualified to act as sales manager of Oregon Portland Cement Company; but the defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, with full knowledge and really because of his affiliations with the other defendants keep and retain said Clark M. Moore as sales manager, and unless restrained and enjoined by this Court will continue to keep and retain him as sales manager, and that said Clark M. Moore through his control of the sales of the various companies is the nucleus and foundation for the absolute control of the prices; and recently said Clark M. Moore at San Francisco participated in a conference between the agents of the defendants incorporated in California and finally perfected and rounded out the schedule hereinbefore mentioned, and upon his arrival at Portland, Oregon, he then held conferences with one Irwin representing the International Portland Cement Company and one Rogers representing the Lehigh Portland Cement Company, and one Short representing Three Forks Portland Cement Company; and said Clark M. Moore in furtherance of the conspiracy has adopted a policy of refusing to quote prices at Seattle, Washington, or other outside points without communicating with some of the other defendants, except Andrew G. Smith, Paul C. Bates and J. G. Wilson, to obtain their latest advices and directions of the price at which they desire him to make quotations. [642]

## XXIV.

That George McDonald and L. C. Newlands were installed in authority as hereinbefore set out by R. P. Butchart, and said McDonald and Newlands are old employees of said R. P. Butchart and of the Vancouver Portland Cement Company, imported to the plant of the Oregon Portland Cement Company for the purpose of carrying out the directions of said Butchart in the conspiracy hereinbefore mentioned.

## XXV.

That Vancouver Portland Cement Company hereinbefore referred to in connection with said Butchart is a company having its principal place of business at Victoria, British Columbia, Dominion of Canada, and is in combination with all the defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, to the extent that it absolutely refrains from competing in the cement business south of the international line, although there is no duty upon its cement and no geographical or natural reason why it should not compete, and the other defendants herein mentioned, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, although logically competitors, do not solicit business or ship cement into Canada,

## XXVI.

That at twelve o'clock noon on Saturday, June 10, 1915, said defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson will, unless restrained by this Honorable Court, meet and amend the by-laws of Oregon Portland Cement Company

by eliminating and doing away with the executive committee, and by placing the entire authority with entire power of said company in the hands of said R. P. Butchart, L. C. Newlands, George McDonald and Clark M. Moore, and will amend [643] the by-laws to eliminate Paul C. Bates and Aman Moore as vice-presidents by abolishing the offices of vice-president, and remove Aman Moore as treasurer of Oregon Portland Cement Company, so that no person except those selected by said R. P. Butchart shall have any detailed knowledge of the business of Oregon Portland Cement Company; and if these steps are taken the Oregon Portland Cement Company, Aman Moore and all other stockholders who are not participating in the combination will be irreparably damaged and injured, in that all the dealers and consumers interested in Portland cement will immediately know that Oregon Portland Cement Company has succumbed to the attacks of and is under the control of the allied cement interests, and the business of said Oregon Portland Cement Company will thereby be ruined; that Aman Moore is the largest stockholder of Oregon Portland Cement Company, owning \$135,700 par value of the preferred stock and \$93,200 of the common stock of Oregon Portland Cement Company, and there are stockholders not interested with R. P. Butchart or the other defendants who own approximately two-thirds of the entire issued stock of Oregon Portland Cement Company, and the acts herein complained of on the part of all the defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson,



are unknown to said stockholders, and the interests of said stockholders will be irreparably damaged if the meeting scheduled for June 10, 1916, is by this Court allowed to be held; that the stockholders of Oregon Portland Cement Company are as follows:

	STOCK	
	Pref. Com.	
J. C. Ainsworth, First Nat. Bank, Portland, Ore. ....	54	40
Paul C. Bates, Yeon Bldg., Portland, Oregon .....	12	12
Oscar Beck, City Engineer's Office, Portland, Or. ....	5	2
[644]		
G. A. Bolderick, Forest Grove, Oregon	10	5
F. G. Baum, 1901-2 Hobart Bldg., San Francisco, Cal. ....	26	13
Mrs. M. Butrick, Portland, Oregon ....	10	5
Minnie Baber, Forest Grove .....	5	2
J. H. Booth, Douglas Natl. Bank, Roseburg, Ore. ....	50	20
J. S. Beckwith, Pendleton, Oregon ....	1	
Wm. W. Bierdneau, 2130 Corbett St., Baker, Ore. ....	10	5
F. S. Bonfils, Denver Post, Denver, Colorado .....	95	40
W. S. Berger, 249 Taylor St., Portland, Oregon .....	5	2
C. Boettcher, Colorado Portland Cement Co., Denver, Colorado .....	95	40
Edw. Est. Biddle, Dallas, Oregon .....	4	2

STOCK  
Pref. Com.

Alice Winder Bradford, Capital Ave., Salt Lake City, Utah .....	2	
R. P. Butchart, Vancouver Portland Ce- ment Co., Victoria, B. C. ....	957	889
D. M. Butchart, Owens Sound, Ont. ....	318	250
A. S. Butchart, 20 Dale Ave., Toronto, Ont. ....	218	150
W. F. Burrell, 2501½ Third St., Port- land, Oregon .....	32	17
S. L. Brown, 663 Stark St., Portland, Oregon .....	10	5
O. C. Beebe, Zion Savings Bank, Salt Lake City, Utah .....	5	
M. J. Ballard, 264 East 25th St., Port- land, Ore. ....	2	
H. J. Biddle, Columbia Contract Co., Portland, Ore. ....	5	
Serge F. Balliff, Logan, Utah .....	2	
W. L. Buckner, No. 8 Eighth St., Port- land, Ore. ....	5	
M. J. Buckley, Wells Fargo Bldg., Port- land, Ore. ....	2	
Chas. S. Burton, Utah State Bank, Salt Lake City, Utah .....	3	
Jno. E. Blunt, Oregon Portland Cement Co., Oswego, Oregon .....	6	6
M. F. Brady, Yeon Building, Portland, Ore. ....	1	1
A. A. Burnard, Los Angeles, Cal. ....	111	111

STOCK  
Pref. Com.

Ruby K. Crain, 594 East Morrison St., Portland, Ore. ....	5	2
U. S. Carpenter, 1325 5th St., Baker, Ore. ....	10	5
Sidney Hauam Carleson, 469 Salmon St., Portland, Ore. ....	21	10
[645]		
Virginia L. Cox, 1657 Bellene Ave., Seattle, Wash. ....	15	7
N. D. Crofutt, Box 445 Lynn Haven, Fla. ....	5	2
H. P. Clark, 607 So. Hall St., Los Ange- les, Cal. ....	56	29
D. B. Clarke, City Hall, Portland, Ore- gon ....	10	5
Gertrude Winder Cannon, Raymond, Alta, Canada ....	2	
Theressa Colvin, Colfax, Wash. ....	5	2
W. W. Cotton, Wells Fargo Bldg., Port- land, Ore. ....	53	40
T. R. Cutler, Salt Lake City, Utah ....	2	
John F. Champion, Equitable Bldg., Denver, Col. ....	95	40
Jno. C. Cutler, Jr., Salt Lake City, Utah	2	
C. C. Conkle, 840 Linden Ave., Long Beach, Cal. ....	47	20
Cement Securities Co., Ideal Bldg., Den- ver, Colorado ....	589	589
Geo. A. Cox Estate, Canada Life Bldg., Toronto, Ont. ....	60	60

## STOCK

Pref. Com.

Cement Emp. Co-op. Assn., Oswego, Oregon .....	10	10
Churchill Hardware Co., Roseburg, Ore- gon .....	2	2
Douglas Natl. Bank, Roseburg, Oregon	240	240
R. L. Donald, Failing Bldg., Portland, Ore. ....	5	2
Clyde C. Dawson, First Natl. Bldg., Denver, Col. ....	47	20
Deseret News, Salt Lake City, Utah ....	5	
A. H. Devers, Clossett & Devers, Port- land, Ore. ....	12	12
Dallas Lumber & Log Co., Dallas, Ore.	3	3
Robert S. Edwards, 3d & Bancroft Way, Berkeley, Cal. ....	19	8
T. C. Elliott, Walla Walla, Washington	20	10
James Ewart, Roseburg, Oregon .....	15	7
E. N. Ewart, Roseburg, Oregon .....	15	8
Edward & Laselle, Railway Ex. Bldg., Portland, Ore. ....	1	1
F. O. Finkle, 448 H. W. Hellman Bldg., Los Angeles, Cal. ....	51	29
A. H. Fleming, Pasadena, Cal. ....	57	29
D. B. Fleck, 4512 42d Ave., SE. Port- land, Ore. ....	11	8
[646]		
F. I. Fuller, Electric Bldg., Portland, Ore. ....	50	27
First Natl. Bank of Whiting, Ind., Whiting, Ind. ....	5	2



STOCK  
Pref. Com.

Jos. Goohegan, Salt Lake City, Utah ..	5	
W. A. Gordon, Portland, Oregon .....	5	
George E. Good, La Grande, Oregon ..	10	5
Grand Canyon L. & C. Co., Ariz., Foot of Commercial St., Los Angeles, Cal. ..	95	40
Nellie E. Grant, Dallas, Oregon .....	10	5
U. S. Grant, Dallas, Oregon .....	10	45
L. D. Gilbert, 704-5 L. W. Hellman Bldg., Los Angeles, Cal. ....	53	41
R. C. Gillis, 1023 Investment Bldg., Los Angeles, Cal. ....	56	29
E. V. Hoover, Review Bldg., Roseberg, Oreg. ....	5	2
F. B. Houghton, 80 East Jackson Blvd., Chicago, Ill. ....	23	10
Matilda Winder Hamilton, Riverton, Utah ....	2	
W. R. Harris, Panama City, Florida..	30	15
James Hobbs, Logan, Utah .....	5	2
Howard Company, First Market St., Oakland, Cal. ....	30	
The Jno. L. Howard Est., 87 Vernon St., Oakland, Cal. ....	24	24
Howard Commercial Co., Oakland, Cal.	160	80
R. A. Hines, Canyon City, Oregon ....	15	7
Mark Hayter, Dallas, Oregon .....	10	5
Margaret V. Haytor, Dallas, Oregon..	5	2
Oscar Haytor, Dallas, Oregon .....	11	8
B. S. Huntington, 805-7 Lewis Bldg., Portland, Ore. ....	10	5

## STOCK

Pref. Com.

O. O. Hall, 474 Gilsan St., Portland, Ore.	10	5
W. P. Hardesty, City Engineer's Office Portland, Ore. ....	10	5
N. P. Haninger, 1897 Peninsular Ave., Portland, Ore. ....	12	5
E. J. Hunt, Alameda, Cal. ....	43	10
W. B. Hunt, Alameda, Cal. ....	16	
Investors Bldg. & T. Co., 407 Yeon Bldg. Portland, Ore. ....	10	5
Harry C. James, Denver, Natl. Bank, Denver, Col. ....	47	20
Robert U. Jacob, San Francisco, Cal. ..	10	5
[647]		
C. S. Jackson, Oregon Journal, Port- land, Ore. ....	12	12
Mrs. A. C. Kidd & Son, Roseburg, Ore- gon ....	5	2
Leora E. Klahr, 539 Lincoln St., Walla Walla, Wash. ....	5	2
F. A. Kiehle, Corbett Bldg., Portland, Ore. ....	10	5
W. J. Kerr, O. A. C. Corvallis, Ore. ..	99	96
C. Leonardt, H. W. Hellman Bldg., Los Angeles, Cal. ....	214	104
H. C. Leonardt, 321 Goodnaugh Bldg., Portland, Ore. ....	160	95
Geo. Lawrence, Jr., Geo. Lawrence Co., Portland, Ore. ....	5	
L. Lovinger, Baker, Oregon ....	10	5

STOCK  
Pref. Com.

A. L. Lucas, 101½ E. 14th St., Portland, Ore. ....	5	2
M. J. Larson .....	5	2
Clementine F. Lewis, Est., Allen & Lewis, Portland, Ore. ....	15	
S. Loughridge, Grants Pass, Ore. ....	3	
Carroll A. Low, Oregon Portland Ce- ment Co., Roseburg, Oregon .....	1	1
W. C. McKewan, 51½ So. First St., Walla Walla, Wash. ....	5	2
Henry McKewan, Utah State Bank, Salt Lake City, Utah .....	1	
Elliott McAllister, 14 Montgomery St., San Francisco, Cal. ....	37	23
Geo. Macdonald, Oswego, Oregon ....	6	6
Wirt Minor, Spaulding Bldg., Port- land, Ore. ....	3	3
Aman Moore, Oswego, Ore. ....	1357	932
Chas. C. Moore & Co., Sheldon Bldg., San Francisco, Cal. ....	23	10
Chester C. Moore, Medical Bldg., Port- land, Ore. ....	29	19
Ella Winder McKay, Calder Station, Salt Lake City, Utah .....	2	
Anna J. Miller, 2458 So. 7th St., E. Salt Lake City, Utah .....	2	
A. L. Mills, 1st National Bank, Port- land, Ore. ....	84	44
J. J. Murphy, Wallowa, Oregon .....	5	2

STOCK  
Pref. Com.

J. E. Murphy, 26 Adelaide St. W., Toronto, Ont. ....	60	60
A. C. Marsters, Roseburg, Oregon ....	10	5
R. W. Marsters, Roseburg, Oregon ....	5	5
Jennie Muldrick Estate, Canyon City, Oregon .....	5	2
[648]		
W. A. Mitchell, Colfax, Wash. ....	15	7
J. R. Mason & Co., Merchants Exeg. Bldg., San Francisco, Cal. ....	54	27
Seeley W. Mudd, 1208 Hollingsworth Bldg., Los Angeles, Cal. ....	354	354
Julius L. Meier, Meier & Frank Co., Portland, Ore. ....	20	10
Reece-Gottfried Co., 67 Front St., Portland, Ore. ....	4	4
Nicholai-Neppach Co., 227 Davis St., Portland, Ore. ....	10	5
Martin Nelson, 457 So. Baker St., Baker, Ore. ....	5	2
C. W. Nibley, Bishops Bldg., Salt Lake City, Utah .....	53	17
Jos. F. Nibley, Salt Lake City, Utah...	10	
Alice Nibley, 444 E. 18th St., No. Port- land, Ore. ....	5	
Alex Nibley, Tr., 444 E. 18th St., No. Portland, Ore. ....	9	
William Nicolai, 227 Davis St., Port- land, Ore. ....	12	12
Oregon Iron & Steel Co., 500 Con- cord Bldg., Portland, Ore. ....	248	248



STOCK  
Pref. Com.

Pacific States Fire Ins. Co., Chamber of Commerce Bldg., Portland, Ore.	10	5
J. P. Penn, Box 85 Salem, Ore. ....	25	12
Fred Phillipin, Canby, Oregon .....	10	5
Mrs. F. A. Rogers, Forest Grove, Ore.	10	5
J. R. Rogers, 90 First St., Portland, Ore. ....	5	2
D. J. Riley, Dallas, Oregon .....	10	5
J. L. Riggs, Salem, Oregon .....	5	2
Charles E. Roberts, Roseburg, Oregon	15	7
George F. Richards, 1010 Third Ave., Salt Lake City, Utah .....	13	5
La Grande Richards, Amsterdam, Hol- land .....	10	5
W. A. Rossiter Est., Zion Savings Bank, Salt Lake City, Utah .....	5	
J. P. Rassmusson, 2d & Taylor St., Portland, Ore. ....	17	14
Tom Richardson .....	3	
George Ramsey Lbr. Co., Salt Lake City, Utah .....	5	
George Ramsey, Salt Lake City, Utah	5	
Joseph F. Smith, Salt Lake City, Utah	1	
Victor C. Smith, San Bernardino, Cal.	47	20
Cecil B. Smith Est., 10 Adelaide St., East Toronto, Ont. ....	47	20
[649]		
Andrew C. Smith, Medical Bldg., Port- land, Ore. ....	213	158

	STOCK	
	Pref. Com.	
Mrs. M. J. Buick Sewell, Roseburg, Oregon .....	20	10
C. J. Sutherland, Wells Fargo Bldg., Portland, Ore. ....	3	
Stockgrowers and Farmers National Bank, Wallowa, Ore. ....	5	2
John J. Scharer .....	50	25
T. W. Sullivan, 101 10th St., Oregon City, Ore. ....	28	13
Dennis Sullivan Est., Denver Natl. Bank, Denver, Colorado .....	47	20
F. F. Seeley Est., Willsonville, Oregon	10	5
Charles H. Stranahan, Hood River, Oregon .....	10	5
J. H. Schaeffer, Roseburg, Oregon ....	10	5
Margaret Stephenson, Box 603, Forest Grove, Oregon .....	25	12
B. T. Soden, 629 East 10th St., No. Portland, Oregon .....	5	2
S. H. Sheldon, 595½ First St., Port- land, Ore. ....	10	5
Jennie Strickler, Colfax, Washington..	10	5
Jas. B. Schuyler Est., Santa Monica, California .....	47	20
Oscar Seley, Baker, Oregon .....	5	2
E. Stenger, St. Joe & G. I. Ry. Co., St. Joe, Mo. ....	23	10
Mary A. Winder Steadman, Riverton, Utah .....	2	

STOCK  
Pref. Com.

Teal & Minor, Spaulding Bldg., Portland, Ore. ....	28	24
Teal, Minor & Winfree, Spaulding Bldg., Portland, Ore. ....	14	14
J. H. Teel, Trustee, Spaulding Bldg., Portland, Ore. ....	12	12
D. H. Turner, Box 212, McMinnville, Ore. ....	5	2
Geo. F. Taplin, Forest Grove, Oregon	20	10
F. B. Trask, 616 Union Oil Bldg., Los Angeles, Cal. ....	47	20
E. L. Thompson, Hartman & Thompson, Portland, Oregon ....	2	
P. A. Vale, Royal Bank of Canada, Toronto, Ont. ....	40	40
Vulcan Iron Works, Wilkesbarre, Pa.	25	25
John P. Vollmar, First Natl. Bank, Lewiston, Idaho ....	20	10
J. C. Westergard, Oswego, Oregon ....	25	10
W. C. Winder and Ruben G. Miller, Trustees, 403 E. 13th St., So., Salt Lake City, Utah ....	1	10
[650]		
Richard Winder, 92 J. Street, Salt Lake City, Utah ....	2	
Edwin J. Winder, 403 E. 15th St. S., Salt Lake City, Utah ....	2	
William C. Winder, 403 E. 15th St. S., Salt Lake City, Utah ....	2	

STOCK  
Pref. Com.

Rex Winder, 403 E. 15th St., So., Salt Lake City, Utah .....	2	
Luella Winder, 2458 S. 7th St., Salt Lake City, Utah .....	2	
W. H. Wilcox, Prairie City, Oregon ..	65	
T. B. Wilcox, Wilcox Bldg., Portland, Oregon .....	165	138
A. J. Wilson, Dallas, Oregon .....	10	5
A. King Wilson, Chamber of Commerce, Portland, Oregon .....	5	2
Margaret Wilkinson, Logan, Utah ....	10	5
F. G. Wilkinson, Logan, Utah .....	10	5
Thos. Whitehorn, Corvallis, Oregon ..	5	2
Arthur Winter, Salt Lake City, Utah	5	
E. L. Warren, S. 211 Pine St., Spokane, Wash. ....	85	42
A. H. Woodruff, Care 3 C. M. I., Salt Lake City, Utah .....	2	
D. C. Williamson, Oswego, Oregon ....	15	8
H. G. Whitney, Salt Lake City, Utah, c/o Deseret News .....	5	
I. N. Woods, Portland, Oregon .....	15	7
T. W. Younger, Care S. P. Co., Sacramento, Cal. ....	25	2
S. A. Whitney, Salt Lake City, Utah..	5	

[651]

And Aman Moore now offers to allow any stockholder of Oregon Portland Cement Company to join him as plaintiff in this suit, and is maintaining the same on behalf of himself, Oregon Portland



Cement Company and any stockholder similarly situated.

## XXVII.

That the stockholders of Oregon Portland Cement Company are scattered throughout the various states of the Union, and it would be impossible in less than six months to obtain their attendance or proxies at a special meeting of the stockholders, and the annual meeting of stockholders is fixed by the by-laws in the second week of January of 1917, and Aman Moore has attempted through the directors of Oregon Portland Cement Company to prevail upon them not to take the action hereinbefore complained of and not to form a combination and to conduct themselves legally, but that said efforts and attempts are unavailing, and unless enjoined by this Honorable Court Aman Moore and all other stockholders similarly situated, and Oregon Portland Cement Company, will be unwillingly making themselves liable to prosecution under the laws of the United States and the laws of the State of Oregon and the ordinances of the City of Portland, and will be greatly damaged and injured in their reputation as well as the irreparable injury and damage to their interest in Oregon Portland Cement Company.

## XXVIII.

That Oregon Portland Cement Company has now Portland cement on hand which should be sold and now has men actually working at its plant who must be paid, and now has a going business which must be attended to.

## XXIX.

That except for relief obtained in this suit in equity plaintiffs are without any adequate remedy and have no remedy at law. [652]

WHEREFORE, plaintiffs pray:

First: That the defendants and all of the defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, be restrained from holding any meeting of the directors of Oregon Portland Cement Company on June 10, 1916, or at any other time until further order of this Court;

Second: That the defendants and all of the defendants, except Andrew C. Smith, Paul C. Bates and J. G. Wilson, be restrained and enjoined from in anywise taking any step of any nature whatsoever towards an understanding or agreement between themselves or with any company producing or handling cement in anywise affecting the output of Oregon Portland Cement Company, or in anywise affecting the conduct with regard to the Portland Cement business of any officer or agent connected with Oregon Portland Cement Company.

Third: That R. P. Butchart be by mandatory injunction directed to perform no further act of any kind or nature whatsoever upon behalf of Oregon Portland Cement Company.

Fourth: That Clark M. Moore be by mandatory injunction directed to perform no further act of any kind or nature whatsoever upon behalf of Oregon Portland Cement Company;

Fifth: That L. C. Newlands be by mandatory injunction directed to perform no further act of any

kind or nature whatsoever upon behalf of Oregon Portland Cement Company.

Sixth: That George McDonald be by mandatory injunction directed to perform no further act of any kind or nature whatsoever upon behalf of Oregon Portland Cement Company.

Seventh: That, for the purpose of protection of the business of Oregon Portland Cement Company, until such time as the stockholders can be called together in a meeting, a receiver be placed in charge of the affairs and business of [653] Oregon Portland Cement Company with full power and authority to conduct and continue said business under an order of this Court, and plaintiffs respectfully suggest that Andrew C. Smith, Paul C. Bates and J. G. Wilson, together with Aman Moore, be appointed jointly as receivers under the orders of this Court and to report to this Court, to conduct the affairs of Oregon Portland Cement Company until the stockholders of said company can legally meet and preserve the existence of said company separate and apart from the trust;

Eighth: For such other and further relief as to the Court seems just and equitable.

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Attorney for Plaintiffs.

State of Oregon,  
County of Multnomah,—ss.

I, Aman Moore, being first duly sworn, depose and say that I am vice-president and treasurer of Oregon Portland Cement Company, one of the plaintiffs above named; that I am also a plaintiff above

named; that I have read the foregoing complaint and verily believe the facts, statements and allegations therein made to be true.

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I Subscribed in my presence and sworn to before me this 9th day of June, 1916.

---

Notary Public for Oregon.

My commission expires —.

Filed December 23, 1920. G. H. Marsh, Clerk.  
[654]

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### **Defendants' Exhibit No. 7.**

June 19, 1916.

Personal:

Mr. R. P. Butchart, President,  
Oregon Portland Cement Company,  
Tod's Inlet, British Columbia.

Dear Sir:

Recently I called your attention to the fact that the construction work on our factory since January first (the date on which the management of same was surrendered by me to Mr. Newlands, appointed by you superintendent) has been prosecuted in a very inefficient manner. While one or two single items of work completed prior to January first exceeded the engineer's estimates, all the work prosecuted previous to that date under my own supervision showed a reduction under the engineers' estimates. Subsequently to the time of surrendering



the work to Mr. Newlands Mr. Gilbert's estimates had been exceeded approximately \$91,000 and Mr. Cantine's had been exceeded approximately \$54,000. Of this amount fifteen to twenty thousand dollars might be accounted for legitimately. It is my opinion that the balance of this work was due to lax management by Mr. Newlands, as I do not believe that the labor has been prosecuted to exceed sixty per cent efficiency since the time that he took charge of the work. Since the factory started operating, about June first, the same inefficiency has continued. Instead of making 1000 barrels output there has been not to exceed 500 barrels of cement produced per day since the factory started. The kiln should average 1000 barrels per day running at its highest efficiency, and in my judgment 1200 barrels of klinkers per day. The raw grinding mills should easily produce enough slurry for 1200 barrels per day and the cement grinding mill should finish from 900 to 1000 per day minimum. [655]

There have been several expensive break-downs, and there seems to be no accurate records kept as to what is being produced from day to day.

I am calling your attention to this condition as President of the corporation as I do not believe that our company will pay expenses if it continues to operate in the present inefficient manner. I assume that you have all the stockholders' interests at heart and that matters will not be permitted to continue as at present any longer.

Very truly yours,

AM.s.

Filed December 23, 1920. G. H. Marsh, Clerk.  
[656]

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**Defendants' Exhibit No. 8.**

Oswego, Oregon, June 19, 1916.

Mr. Wirt Minor,

c/o Teal, Minor & Winfree,

Spaulding Building, Portland.

Dear Sir:

Referring to our conversation of yesterday, and your request for me to write you basis on which a reorganization of the board of directors of the Oregon Portland Cement Co. might be effected, satisfactorily to myself and those I represent, will say that in order to prevent the company from being involved in litigation, I am willing to co-operate in the selection of a new board along lines as follows:

1. Have the company's charter amended, reducing the number of directors from nine to seven.

2. Have all the present directors resign from the board except the following:

R. P. Butchart.

Aman Moore.

Andrew C. Smith.

Paul C. Bates.

3. Elect three new directors, including Mr. T. B. Wilcox or some representative to be named by him or the Ladd interests, excepting A. S. Patullo.

The remaining two members of the board should

be chosen from among the stockholders residing in Oregon.

Mr. J. H. Booth, Pres. of the Douglas Natl. Bank of Roseburg, who is the heaviest stockholder in Ore. excepting myself, would be acceptable to me as I presume to everyone else concerned.

The final member for the board to be chosen from the following list of Portland stockholders, to wit:

A. H. Devers.

F. I. Fuller. [657]

O. O. Hall.

Geo. Lawrence, Jr.

F. E. Beach.

J. R. Rogers.

J. P. Rasmussen.

— Neppach.

E. L. Thompson.

I have no preference regarding any of the above parties, in fact am scarcely acquainted with any one of them. These men are all representative business men of the city and I believe would all make impartial directors for our company.

I have not named either Mr. Boettcher or Mr. Leonardt of Cal. because these gentlemen would both be disqualified to serve on our board after Oct. 15th when latest amendments to the Sherman Law go into effect; as I understand the interlocking directorates of industrial corporations doing an interstate business will, after that date be prohibited by law.

Mr. Butchart at that time will also be disqualified to serve on our board, but he may have the privilege

of naming his own representatives upon his resignation.

Yours truly,

AMAN MOORE.

Filed December 23, 1920. G. H. Marsh, Clerk.  
[658]

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**Defendants' Exhibit No. 9.**

ALEXANDER & BALDWIN, LTD.

Of Honolulu, Ty., Hawaii.

Seattle, Wash., February 1, 1916.

Mehlhorn Bldg.

Messrs. Oregon Portland Cement Co.,

Oswego, Ore.

Gentlemen:

**PORTLAND CEMENT.**

We have for acknowledgment your favor of Jan. 27th, and are pleased to note that you will be in a position on or before April 1st to place your product on the market.

Our interests are entirely in the Hawaiian Islands, where there is as you are doubtless aware, a considerable market for cement which up to the present time has been dominated by San Francisco interests.

At times also, large shipments enter this territory from Hong Kong and the purpose of this letter is to find out whether you feel you are in a position to enter this field and meet the competition above referred to.



If so, we would like to further consult with you on the subject with a view to introducing this brand in Hawaii.

Although the American-Hawaiian S. S. Co. have commenced a direct service from Portland to the Hawaiian Islands, we believe it will be necessary to figure in cost of exporting this cement via Tacoma, as we are under the impression that the Portland service is not a permanent one.

Trusting to hear from you further on this business, we beg to remain,

Yours very truly,  
ALEXANDER & BALDWIN, LTD.

By E. R. ADAMS,  
Seattle, Manager. [659]

CBW/H.

February 2, 1916.

Alexander & Baldwin, Ltd.,  
Melhorn Bldg.,  
Seattle, Wash.

Gentlemen:

We have your communication of the 1st inst. and have noted the contents thereof with interest. We would be very glad to furnish our product in the Hawaiian market. It would be much better however, to make shipments direct from Portland, as our factory is along the Willamette River where the barging charge of not to exceed 3¢ will deliver cement alongside of ships in the Portland harbor.

We should be able to compete with any other plant manufacturing on the Pacific Coast, for ship-

ments into the Hawaiian territory, providing shipments can be made direct from Portland. If however, we should be compelled to ship by rail to Tacoma, we would be greatly handicapped on account of the extra freight rate of 32¢ per barrel to that point as against 19¢ per barrel from factories of the Northern Washington Companies.

We have just been advised that the union Steamship Co. of Victoria, B. C. is intending to establish a direct line to Australia from Portland, touching points on the Hawaiian Islands. We have taken up with these people, the matter of making shipments of our product to Honolulu. We will be very pleased to hear from you further, and to be advised as to the present prices at which Portland Cement is being sold in the Hawaiian Islands, and what competition we would have to meet in order to do business in that territory.

Again thanking you for your communication, and trusting that we may be able to do some business with your company, we remain,

Very truly yours,

OREGON PORTLAND CEMENT COMPANY.

---

Vice-President & Treasurer.

M-W. [660]

ALEXANDER & BALDWIN, LTD.

Of Honolulu, Ty., Hawaii.

Seattle, Washington, Feb. 7, 1916.

Mehlhorn Bldg.

Messrs. Oregon Portland Cement Co.,

Oswego, Ore.,

Gentlemen:

CEMENT.

We have for acknowledgement your favor of the 2d inst. contents of which have been duly noted.

In respect to the Union Steamship line from Portland, would advise that since this line is under the British flag, they would not be permitted to carry merchandise from Portland to the Hawaiian Islands, being prohibited by the U. S. Coastwise laws which permits only American bottoms to enter into this trade.

Regarding price, believe California plants are quoting to-day in the neighborhood of \$1.65 per barrel, less 1% F. O. B. Steamer, San Francisco, allowing a refund of 10 cents for each sack, returned in good order.

This makes their basis approximately \$1.25 less 1% F. O. B. Steamer, San Francisco.

We have now in our hands, an inquiry from the Kahului Railroad Co. which we represent for 20,000 barrels cement to be put up in wooden barrels lined with waterproof paper to weigh approximately 200 lbs. gross.

You probably have not figured on this form of container, but would say for your information that the California plants have recently equipped them-

selves to put up cement in this manner and are figuring on this business.

We would suggest that by conferring with the Western Cooperage Co. you might be able to do likewise and would appreciate [661] your making us a quotation F. O. B. American-Hawaiian steamer Portland, finding out from the Agent of that line whether they will have a service out of Portland to the Islands after April, when we understand your plant will be in operation, or preferably a C. I. F. price Kahului (F. A. S. Ship's tackles Kahului).

The present freight rate from Puget Sound to Hawaiian Island Ports is \$2.75 per ton of 2000 lbs. and we believe you will find the American-Hawaiian S. S. Co. will quote the same tariff from Portland.

Cement must be guaranteed to pass Hunt's inspection and quotations should figure in this cost of testing.

This order for 2000 tons will no doubt be placed within the next ten days.

In any case, we will keep in touch with you on future business and trust conditions will permit of our placing some orders in your hands.

Yours very truly,

ALEXANDER & BALDWIN, LTD.

By C. B. WARREN,

For Seattle Manager.

CBW/H. [662]



Feb. 9, 1916.

Alexander & Baldwin,  
Mehlhorn Bldg.,  
Seattle, Wash.

Gentlemen:

Yours of the 7th inst. received and carefully noted. The prices of \$1.25 per barrel F. O. B. Steamer Portland, would not be attractive to us at this time, although we might be able to consider selling at such a low price later on if we find that we are not able to market our output locally.

If the trade in the Hawaiian Islands would demand a wooden barrel containing 200 pounds gross, and if we should decide to enter that market, we would of course, arrange to supply the kind of packages required. We expect to have a representative in your city within the next 60 days, at which time, we will be glad to take the matter up with you further.

Thanking you for your inquiry, we remain,

Very truly yours,

OREGON PORTLAND CEMENT COMPANY,

M-W.

\_\_\_\_\_,  
Vice-President & Treasurer.

Filed December 23, 1920. G. H. Marsh, Clerk.

[663]

**Defendants' Exhibit No. 10.**

Mr. George Macdonald, Secretary,  
Oregon Portland Cement Company,  
Portland, Oregon.

Dear Sir:

In the absence of R. P. Butchart, President of the Oregon Portland Cement Company, I, as Vice-President of said corporation, do hereby request you to call a special meeting of the directors of said corporation to be held at the office of the corporation in the Wilcox Building in Portland, Oregon, on Monday the 28th day of August, 1916, at two o'clock P. M.

The business to be transacted at such meeting and which must be stated in your call shall be as follows:

First: To obtain the various data from R. P. Butchart, L. C. Newlands, George Macdonald, Clark M. Moore and M. J. Ballard in relation to an agreement made by Clark M. Moore with Pacific Portland Cement Company, Standard Portland Cement Company, Santa Cruz Portland Cement Company, Henry Cowell Lime & Cement Company, Three Forks Portland Cement Company, Union Portland Cement Company and Colorado Portland Cement Company that the product of our plant should be sold in accordance with the following schedule:

“To Dealers:

\$2.30 per barrel gross f. o. b. the cars on the terminal team track of any of the steam railroads, or f. o. b. cars at the dealers warehouse spur buying the cement. Or ex-dock.

\$2.35 per barrel gross f. o. b. any other spur within the city limits of Portland.

Less 10¢ per barrel dealers commission.

“To Consumers:

\$2.30 per barrel f. o. b. the dock or f. o. b. the [664] cars at the team track of any of the steam railroads.

\$2.35 per barrel in load lots, minimum of 15 barrels delivered anywhere within the following district:

On the west side of the river beginning at the north end of 16th street, extending south to Hall Street, and from 16th and Hall Streets to the river. On the east side at a point commencing where Division Street would start from the river east to 12th street, and north on 12th street to Russell, and west again on Russell Street to where it would connect with the river.

Both sides of the street above mentioned to be within the \$2.35 haul.

All other delivery points within the city limits of Portland to be \$2.45 per barrel delivered, minimum of not less than 15 barrels.”

The said agreement providing that the above schedule would apply as to business in Portland, Oregon, and as to business outside of Portland, Oregon, except as limited as hereinafter stated, the schedule should apply with the addition thereto of the cost of transportation and delivery from Portland, Oregon; that about the same time that the agreement hereinbefore set out was made the said Clark M. Moore entered into an agreement with the

Vancouver Portland Cement Company of Victoria, B. C., Olympic Portland Cement Company, Superior Portland Cement Company, Washington Portland Cement Company, Three Forks Portland Cement Company, Union Portland Cement Company and Colorado Portland Cement Company, providing that our product should not be sold beyond the Columbia River, and as a means of preventing the sale of our product, agreed that we should quote only when inquiries were made and at a higher price than other cement companies quoted on the other side of said river, and that our company make no attempt to solicit [665] business beyond the Columbia River in Washington; that this agreement extended to the territory to the north of the Columbia River to points east of Pasco, Washington; and the said Clark M. Moore made a further agreement with the International Portland Cement Company, Lehigh Portland Cement Company, Three Forks Portland Cement Company, Union Portland Cement Company and Colorado Portland Cement Company to the effect that our product be not sold to points further east than Umatilla and only at points west of said town, including branch lines of the O. W. R. & N., and the Oregon Trunk entering Central Oregon; and to points east of Umatilla our company under said agreement, was not to solicit business and was to quote only when inquiries were received by us at a price satisfactory to the other cement companies; and commencing in 1911 the allied cement interests in the Pacific Coast states commenced a series of attacks upon the plant which



is now our property and continued the same during *the* until our present reorganized company was incorporated, and from the time of incorporation of our present company to the present time.

Second: To consider and pass upon a resolution which I shall offer at said meeting, a copy of which is hereto attached marked "Exhibit 1."

Third: To consider and pass upon a resolution which I shall offer at said meeting, a copy of which is hereto attached marked "Exhibit 2."

Fourth: To consider and pass upon a resolution which I shall offer at said meeting, a copy of which is hereto attached marked "Exhibit 3."

Dated at Portland, Oregon, this 14th day of August, 1916.

AMAN MOORE,  
Vice-President Oregon Portland Cement Com-  
pany. [666]

#### EXHIBIT No. 1.

WHEREAS, at the meeting held upon the 17th day of July, 1916, by this body, certain reports with regard to the condition of the Company, etc., were made verbally or by written memoranda, and

WHEREAS, Mr. Newlands read a certain letter from one Mr. Gilbert, and Whereas, no record was preserved of the same or of the reports made at said meeting, and

WHEREAS, Aman Moore has previously made protest against the present conduct of the Company,

THEREFORE, BE IT RESOLVED, that a written record in detail in the minutes of this body be made, covering all reports submitted to or consid-

ered by this board; also that a copy of the Gilbert letter presented by the Superintendent, Mr. Newlands, be secured and held in the files by the Secretary, with copy supplied to each director, and that in the future the reports of all agents, directors, officers, or employees be in writing and made a part of the record of the minutes of the meetings of this board; and that at all meetings a copy of any such reports or matters to so be reported, shall be delivered to each director, and that no matter be presented to come before the Board or be acted upon by the Board unless the same is in writing, accompanied by the copies herein mentioned.

Respectfully submitted, [667]

EXHIBIT No. 2.

Portland, Oregon, July 20, 1916.

To the Board of Directors of the Oregon Portland Cement Company:

WHEREAS, the company's factory at Oswego is able to manufacture one thousand barrels of cement per day, and whereas the shipments for the month of June were only 6931 barrels and for the first thirteen days of July were only 2185 barrels; and whereas, at the present time the company's cement storage bins are full, the klinker storage bins are also filled and several thousand barrels of klinker have been piled out in the open; and

WHEREAS, one of the chief causes for this lack of shipment is due to the fact that our sales manager is trying to serve two or three masters; that he is also sales manager for a factory in Colorado, one in Utah, and one in Montana, therefore rendering

it impossible for him to spend more than a few days in the month in the State of Oregon; and whereas, the sales manager, in co-operation with the president of our company, has made certain price agreements and has entered into certain unlawful agreements with our competitors restricting our territory to Central and Western Oregon only; and whereas, in spite of the fact that our own sales territory has been restricted, we are compelled to divide the business in this restricted territory with four plants in California; and whereas, the total market in this territory would be required to market our output; and whereas, our freight rates to certain territory covering all of Southwestern Washington, including the city of Olympia, and all points south, are the same as our competitors, [668] and the distance of this territory is less from our plant at Oswego than from the plants of our competitors, which would in justice to our company make it imperative for the railroad companies to grant us a less rate to points in this territory than our competitors now have, and

WHEREAS, all the territory in Eastern Oregon along the points of the O.-W. R. & N. Company's railroad to and including Huntington, Oregon, and to points as far east as Mountain Home, Idaho, are equi-distant, or a less distance from plants in Spokane, Washington, and points in Utah; and whereas, our freight rates to all points from the Deschutes River to Huntington, Oregon, and points intervening, are the same as our nearest competitors, the International Portland Cement Com-

pany, of Spokane, Washington; and whereas, there is no legitimate or business reason why we should not sell cement in the State of California, at least in equal quantity to the sales of the California companies in the State of Oregon:

NOW, THEREFORE, BE IT RESOLVED, that the present sales manager of our company be forthwith asked to resign; also that the president of our company, and all his appointed agents who are now directing the management of our company, shall be asked to resign immediately, since the president is a director of a competing company, in British Columbia and a heavy stockholder in the Washington Portland Cement Company, another competitor; and that all agreements that have been entered into by the president or the sales manager, or both, on behalf of our company, whereby our territory has been restricted, and price agreements have been made with our competitors, shall be forthwith and immediately rescinded and repudiated by our company, and that new officers be elected who will serve but one master, to-wit; the Oregon Portland Cement Company, and [669] who shall exercise an unrestricted right and policy to dispose of the output of our factory at prevailing market prices at points in Oregon, Washington and California, or at the best obtainable prices which will be high enough to insure good dividends to the stockholders of our company and not be unreasonably high or of a monopolistic character.

And that the Directors of the Company, as follows: Wirt Minor, M. J. Ballard, L. C. Newlands,



Wm. Johnson and R. P. Butchart, because of their affiliations or small stock holdings, resign from this Board of Directors.

Respectfully submitted, [670]

EXHIBIT No. 3.

WHEREAS, the Secretary of this Company, Mr. George MacDonald, and the Superintendent, Mr. L. C. Newlands, have under date of June 15, 1916 and June 23, 1916, sent out certain letters to the stockholders of the Company attacking the personal integrity of the Vice-President and Treasurer of the Company, Mr. Aman Moore, and

WHEREAS, the letter under date of June 15, 1916, was written on the stationery of the Oregon-Portland Cement Company and signed by the Cement Company with the above mentioned Newland's and MacDonald's typewritten signatures following the name of the Cement Company as officers, and

WHEREAS, the letter under date of June 23, 1916, was also sent out under the heading of the Oregon-Portland Cement Company, and Whereas these letters were gotten out by the stenographers and employees of the Cement Company and all expenses in connection therewith were paid by the Cement Company, and

WHEREAS, said letter dated June 15, 1916, contained the following clause, to wit:

"Mr. Moore, through many acts which had shown extravagance and want of foresight, lost the confidence of your Board of Directors early in this year."

And, WHEREAS, said letter dated June 15, 1916, also states the following:

“Since this time Mr. Moore has expended a great deal of the company’s money (over four thousand dollars) directly against the express instructions of the President. He has also made at least one contract which may involve the Company in expensive litigation.” [671]

And, WHEREAS, under date of June 16, 1916, a copy of the letter addressed to Montague O’Reilly, signed by the said Aman Moore, was forwarded to our stockholders, also an additional letter containing the following paragraph was contained therein:

“A very large sum is involved in this contract, which only came to light on June 14th, and long after the contractors had taken the job at a low figure. Also please note this pavement is not to be constructed with cement, but of competitors material, so that we had no prospects of gain or profits by the transaction.”

And, WHEREAS, under date of June 23, 1916, in a circular letter, additional statement by the said MacDonald and Newlands was made as follows:

“To obtain this money, he sold your locomotive, steel rails, office furniture, cement, sand, gravel, etc.”

And, WHEREAS, all of the above statements are libelous, false and untrue, and having been signed by the officers of the Company, would make the Company liable for damages to the said Aman Moore, and

WHEREAS, the said MacDonald, as Secretary of the Company, delivered a statement to the Board of Directors at their last meeting, which statement was dated June 30, 1916, containing an item under heading as follows:

“Aman Moore Paving Company—\$6,546.72.”

And, WHEREAS, such item is not properly charged on the books, as any amount expended in the paving propaganda should have been properly charged to the advertising department of the sales department, and

WHEREAS, under date of June 22, 1916, there appeared in the Oregon City Enterprise, Oregonian, the Daily Bulletin, [672] and other newspapers in the City of Portland, the following article to wit:

**“CEMENT COMPANY WILL MOVE OFFICES  
TO PORTLAND.**

“Melvin J. Ballard, Vice President and director of the Oregon Portland Cement Company, has been appointed the company’s acting vice-president and hereafter the management of the company will be under his jurisdiction. Originally the main office was at Oswego, but the officer in charge of the company’s affairs have likewise been transferred to Portland. The following are the company’s active officers: Melvin J. Ballard, vice-president; George MacDonald, secretary; Clark M. Moore, general sales manager; L. C. Newlands, general superintendent and director in charge of operations, having supervision over the plant, quarries and

railroad properties of the company. Mr. Newlands makes his headquarters at Oswego and is the only active officer there,”

which must have been written, inspired or dictated by either the said MacDonald, Secretary, or the said Newlands, Superintendent, or both of them.

THEREFORE, BE IT RESOLVED:

First: That the said MacDonald and Newlands be and are hereby requested to send no further communications of any kind to the stockholders except by the express authorization and request of the Board of Directors.

Second: That this company repudiate the above-mentioned letters and all responsibility of the same so far as the company is concerned; and that hereafter, if the said MacDonald and Newlands desire to wage a political campaign among the stockholders to secure proxies or for other purposes that may [673] appear to be of political nature, that they do the same under their own names instead of the name of the Company, and that the expenses of such campaign be paid by the said MacDonald and Newlands personally.

Third: That all expenses for sending out the above letters mentioned to the stockholders, shall be paid back to company by the said MacDonald and Newlands.

Fourth: That the said MacDonald and Newlands be requested to make specific charges as pertaining to their complaint Number 1, wherein they stated that Mr. Moore had been extravagant in the execution of the construction work under his management



during the months of October 1st to January 1st last; that they be requested to place in writing before this Board all specific instances of such extravagances charged against Mr. Moore.

Fifth: BE IT FURTHER RESOLVED, that the said MacDonald and Newlands produce evidence to show that any money expended by said Moore in waging an educational propaganda in connection with paving materials was "directly against expressed instructions of the President."

Sixth: BE IT FURTHER RESOLVED, that the said Secretary be instructed to write the stockholders, advising them of the fact that this Board of Directors have today unanimously ratified the contract entered into by Mr. Moore on behalf of this Company with the Montague O'Reilly Company in connection with the paving contract and for the express purpose of testing the legality of the patents of the "Warren" people.

Seventh: BE IT FURTHER RESOLVED, that the said MacDonald, Secretary, and Newlands, Superintendent, be requested to write a letter to the stockholders of the Company, acknowledging [674] their mistake when they stated the following:

"To obtain this money, he sold your locomotive, steel rails, office furniture, cement, sand, gravel, etc."

Eighth: BE IT FURTHER RESOLVED, that the said MacDonald be requested to furnish this Board a detailed statement of the item of \$6,546.72, appearing in the statement rendered to the Board

at its last meeting and dated June 30, 1916, under the following heading:

“Aman Moore Paving Company—\$6,546.72.”

And, BE IT FURTHER RESOLVED, that the said MacDonald, as Secretary of this company, be instructed to place this item under the proper heading of *advertising* in the sales department since there never has been an Aman Moore Paving Company, and such item has evidently been so listed by MacDonald to embarrass or annoy the said Aman Moore.

Ninth: BE IT FURTHER RESOLVED, that said newspaper articles referred to above, purporting to convey the false information to the public that the said Aman Moore had been removed as an officer of this company and replaced by Melvin J. Ballard, thereby doing the said Aman Moore an injustice and a damage, be retracted, and

BE IT FURTHER RESOLVED, that the said MacDonald and Newlands be requested to not again repeat such false statements or give out such false information to the newspapers without first being authorized by this Board of Directors. [675]

**Defendants' Exhibit No. 28.**

**FREIGHT BILL.**

Delivered to 22548.

6/13/16.

The J. McCracken Co., Portland, Oregon.

c/o McCracken Switch, 15th & Pettygrove Sts.

To Southern Pacific Company, Dr.

For Charges on Articles Waybilled	Waybill date and number	Car initials and number	Freight bill No.
Oswego via	6/9 11	NP 26169	24103

ARTICLES	Weight PUB.	Rate	Freight	Advances	Total
C/L Oregon Portland					
560 sx Cement at 95 lbs.					
SL&C 53200	53200	04	2128		
25 ton car ordered					
Industry track					
June 16, 1916					
MC A					

Received payment for the company. J/TJA/AS.

Collect. 21.28.

6/12/16.

(Stamp) SOU. PAC. CO.

R. A. MARTIN,

Agent.

Per Painter.

6/19/16. [676]

DEFENDANTS' EXHIBIT No. 28—Cont'd.

SOUTHERN PACIFIC COMPANY.

THIS MEMORANDUM is an acknowledgment that a bill of lading has been issued and it is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading, at Oswego, Oregon, June 9, 1916, from ———, the property described below, in apparent good order except as noted (contents and condition of contents or packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road; otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

CONSIGNED TO—The J. McCracken Co. c/o McCracken switch, 15th and Pettygrove, Portland, Oregon; car initial N. P. Car No. 26169.

No. Packages.	Description of Articles and	Weight
1	Special Marks	
Car	"Oregon" Portland Cement 560 sacks	53,200
	S. L. C.	

G. M. LESLIE,

Agent.

Per K.

OREGON PORTLAND CEMENT, Shipper.

Per D. C. WILLIAMSON. [677]



**Defendants' Exhibit No. 29.**

1104 Wilcox Building,  
Portland.

June 13, 1916.

Wasco Lumber Co.,  
Wasco, Oregon.

Gentlemen:

The first barrel of Portland Cement ever manufactured in the State of Oregon, and made from material produced within the State, has been put on the market for sale, and we are now ready for furnish you promptly with any amount of Oregon-made Portland Cement that you may require, and further, are in position to guarantee our product to be equal in quality to that of any other brand of cement offered you to-day.

We fully realize the high standard set by our worthy competitors both in quality of their product and splendid treatment extended to their patrons. We know that it is only by at least equaling that standard that we may expect recognition at your hands.

We hope that you may send us an order at once for a carload or more of "OREGON" brand Portland Cement, which we are in position to ship immediately, and which we guarantee to pass specifications recommended by the American Society for Testing Materials as well as the United States Government. We assure you of our sincere appreciation of, and most careful attention to your orders.

Anticipating the pleasure of a favorable reply,  
we beg to remain,

Very truly yours,

---

General Sales Manager.

M-W. [678]

1104 Wilcox Building,  
Portland.

June 10, 1916.

Ashland Lumber Co.,

Ashland, Oregon.

Gentlemen:

The first barrel of Portland Cement ever manufactured in the State of Oregon, and made from material produced within the State, has been put on the market for sale, and we are now ready to furnish you promptly with any amount of Oregon-made Portland Cement that you may require, and further, are in position to guarantee our product to be equal in quality to that of any other brand of cement offered you to-day.

We fully realize the high standard set by our worthy competitors both in quality of their product and splendid treatment extended to their patrons. We know that it is only by at least equaling that standard, that we may expect recognition at your hands.

We hope that you may send us an order at once for a carload or more of "OREGON" brand Portland Cement, which we are in position to ship immediately, and which we guarantee to pass specifi-

cations recommended by the American Society for Testing Materials as well as the United States Government. We assure you of our sincere appreciation of, and most careful attention to your orders.

Anticipating the pleasure of a favorable reply, we beg to remain,

Very truly yours,

---

General Sales Manager.

M-w.

Filed December 23, 1920. G. H. Marsh, Clerk.  
[679]

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**Defendants' Exhibit No. 96.**

**ARTICLE V.**

**Executive Committee.**

Section 1. There shall be an executive committee to consist of the president, who shall be *ex-officio* chairman, and two other members of the board of directors who shall be appointed by the board. Such committee shall be chosen annually at the first meeting of the board of directors after the annual election of stockholders, or as soon thereafter as possible, and shall, while the board is not in session, have all the powers of the board to manage the affairs and business of said corporation in such manner as said committee shall deem best for the interest of the corporation, and in all cases in which special directions shall not have been given by the board. The members of the executive com-

mittee shall serve during the life of the board that appointed it, provided, however, that any member can be removed by a majority of the board of directors at any regular or special meeting.

Section 2. The executive committee may appoint such subordinate committees as it may deem necessary, and shall keep a full and accurate report of all its actions and proceedings and report the same from time to time to the board of directors.

Section 3. Regular meetings of the executive committee shall be held at the times fixed by said committee, and special meetings may be called at any time by the chairman, and shall be called at the request of any two members of the committee.

Section 4. Notice of each meeting shall be sent by mail or by telegraph to all members of the committee not less than twenty-four hours before the meeting unless such notice is specially waived by the committeemen to whom the same was not so mailed or telegraphed.

Section 5. Two members of the committee shall constitute a quorum for the transaction of business.  
[680]

## ARTICLE V.

### Executive Committee—(Continued).

Section 6. Any vacancy in the committee shall be filled by the board of directors. [681]



**Defendants' Exhibit No. 97.**

**TELEGRAM.**

Received at 76 Third St. Cor. Oak., Portland,  
Oregon.

1916, Aug. 30, PM. 5 10.

B242SF 150 Coll Blue,

Denver Colo 1156A 30

J. E. Moore,

Oregon Portland Cement Co.,

1104 Wilcox Bldg., Portland, Org.

I have never objected to selling cement in Vancouver or anywhere else and Hollister told me he had a sale ready to close which I supposed was done If the price is profitable by meeting our competitors price then sell all you can but as I understand the situation we cannot get sufficient number of cars in which to load cement for Portland and other Oregon points that make us more money therefore no one who really has the best interest of our company at heart would ask that we fill orders in other states that net us less money and neglect our own state trade Of course we must establish an agency at Vancouver Washington anytime we can get good representation but not place our cement for resale with some one that may prove detrimental to our interests in the future Please show this telegram to Mr. Minor.

CLARK M. MOORE.

Received Aug. 30, 1916.

Filed December 23, 1920. G. H. Marsh, Clerk.

**Defendants' Exhibit No. 117.**

OREGON PORTLAND CEMENT CO.

Oswego, Oregon.

Denver, Colo., July 12, 1916.

Mr. C. T. W. Hollister,

Oregon Portland Cement Co.

1104 Wilcox Bldg.,

Portland, Oregon.

Dear Sir:

Replying to your letter of July 7th, would say, that I am certainly gratified to know of the tests and reports by Prof. Graf of the Agricultural College, and now that our cement is on the City list, I hope that we may be able to increase our shipments a little.

I should think that Montague and O'Reilly would soon be ready to begin the McMinville work. I am anxious to hear, that you have definitely signed the contract on the Oregon City work. I am surprised, however, at the action taken by Mr. Yates, of Wasco, and I hope you will have Mr. Wellman see him at once. If you have finished with Mr. Wellman in the city sufficiently for the present, he might make some of the eastern territory on those branches from the main line, for the balance of the week, and then return to Portland and continue working in the city. This, however, I leave to your best judgment.

I am glad to have copies of the letters written by J. E., as well as his portion of your letter of the 7th inst., and surely things are breaking for

us in the territory south of Portland, and I anticipate it will only be a short time when we will be able to have practically all of the trade in that territory lined up.

I still expect to see you very soon, and beg to remain meantime,

Yours truly,  
CLARK M. MOORE,  
General Sales Manager.

CMM/CP.

Filed December 23, 1920. G. H. Marsh, Clerk.  
[683]

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AND AFTERWARDS, to wit, on the 18th day of August, 1921, there was duly filed in said court a petition of R. P. Butchart for writ of error, in words and figures as follows, to wit:  
[684]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

S. H. COWELL, W. H. GEORGE, F. G. DRUM,  
R. B. HENDERSON, FRANK W. ERLIN,  
WILLIAM G. HENSHAW, TYLER HENSHAW,  
GEORGE T. CAMERON, FRED H. MUHS,  
JOHN C. EDEN, A. A. SUTHERLAND,  
A. F. COATS, ALEXANDER BAILLIE,  
W. P. CAMERON, R. P. BUTCHART,  
and CLARK M. MOORE,

Defendants.

**Petition of R. B. Butchart for Writ of Error.**

To the Honorable Judges of the District Court of  
the United States for the District of Oregon:

R. P. Butchart, defendant in the above-entitled cause, wherein the United States of America is plaintiff and S. H. Cowell, W. H. George, F. G. Drum, R. B. Henderson, Frank W. Erlin, William G. Henshaw, Tyler Henshaw, George T. Cameron, Fred H. Muhs, John C. Eden, A. A. Sutherland, A. F. Coats, Alexander Baillie, W. P. Cameron, R. P. Butchart, and Clark M. Moore are defendants, by his attorneys, Teal, Minor & Winfree, Wirt Minor, and A. B. Winfree, feeling aggrieved by the judgment entered upon the verdict in the above-entitled cause on the 23d day of February, 1921, prays that a writ of error may issue, and that he, the said R. P. Butchart may be allowed to bring up for review before the Honorable United States Circuit Court of Appeals for the Ninth Circuit said judgment in said cause under and according to the laws of the United States in that behalf made and provided; that your petitioner R. P. Butchart may prosecute said writ of error to the said United States Circuit Court of Appeals for the Ninth Circuit; that the said judgment upon said verdict may be reversed and that said judgment upon said verdict against R. P. Butchart may be reversed by the said United States Circuit Court of Appeals for the Ninth Circuit; that upon the giving by your petitioner of security upon said writ of error in the amount of Eight Thousand Dollars (\$8,000.00)



[685] the proceedings of this court may be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit; and for such other and further relief in the premises as may be just; and your petitioner will ever pray.

Dated this 18th day of August, 1921.

R. P. BUTCHART,

By WIRT MINOR,

One of His Attorneys.

TEAL, MINOR & WINFREE,

WIRT MINOR,

A. B. WINFREE,

Attorneys for the Said Defendant R. P. Butchart.

Service of the within petition for writ of error and receipt of a copy is hereby admitted this 18th day of August, 1921.

HALL S. LUSK,

Assistant United States Attorney,

Of Attorneys for Defendant in Error.

Filed August 18, 1921. G. H. Marsh, Clerk.

[686]

AND AFTERWARDS, to wit, on the 18th day of August, 1921, there was duly filed in said court a petition of Clark M. Moore for writ of error, in words and figures as follows, to wit: [687]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

S. H. COWELL, W. H. GEORGE, F. G. DRUM,  
R. B. HENDERSON, FRANK W. ERLIN,  
WILLIAM G. HENSHAW, TYLER HEN-  
SHAW, GEORGE T. CAMERON, FRED H.  
MUHS, JOHN C. EDEN, A. A. SUTHER-  
LAND, A. F. COATS, ALEXANDER BAIL-  
LIE, W. P. CAMERON, R. P. BUTCHART,  
and CLARK M. MOORE,

Defendants.

**Petition of Clark M. Moore for Writ of Error.**

To the Honorable Judges of the District Court or  
the United States for the District of Oregon:

Clark M. Moore, defendant in the above-entitled cause, wherein the United States of America is plaintiff and S. H. Cowell, W. H. George, F. G. Drum, R. B. Henderson, Frank W. Erlin, William G. Henshaw, Tyler Henshaw, George T. Cameron, Fred H. Muhs, John C. Eden, A. A. Sutherland, A. F. Coats, Alexander Baillie, W. P. Cameron, R. P. Butchart, and Clark M. Moore are defendants, by his attorneys, Teal, Minor & Winfree, Wirt

Minor, and A. B. Winfree, feeling aggrieved by the judgment entered upon the verdict in the above-entitled cause on the 23d day of February, 1921, prays that a writ of error may issue, and that he, the said Clark M. Moore may be allowed to bring up for review before the Honorable United States Circuit Court of Appeals for the Ninth Circuit said judgment in said cause and according to the laws of the United States in that behalf made and provided; that your petitioner Clark M. Moore may prosecute said writ of error to the said United States Circuit Court of Appeals for the Ninth Circuit; that the said judgment upon said verdict may be reversed and that said judgment upon said verdict against Clark M. Moore may be reversed by the said United States Circuit Court of Appeals for the Ninth Circuit; that upon the giving by your petitioner of security upon said writ of error in the amount of Five Thousand Dollars (\$5000.00), [687½] the proceedings of this court may be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit; and for such other and further relief in the premises as may be just; and your petitioner will ever pray

Dated this 18th day of August, 1921.

CLARK M. MOORE,

By WIRT MINOR,

One of His Attorneys.

TEAL, MINOR & WINFREE,

WIRT MINOR,

A. B. WINFREE,

Attorneys for the Said Defendant.

Service of the within petition for writ of error and receipt of a copy is hereby admitted this 18th day of August, 1921.

HALL S. LUSK,  
Assistant United States Attorney, of Attorneys for  
Defendant in Error.

Filed August 18, 1921. G. H. Marsh, Clerk.  
[688]

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AND AFTERWARDS, to wit, on the 18th day of August, 1921, there was duly filed in said court assignment of errors of R. P. Butchart, in words and figures as follows, to wit: [689]

In the District Court of the United States for the  
District of Oregon.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

S. H. COWELL, W. H. GEORGE, F. C. DRUM,  
R. B. HENDERSON, FRANK W. ERLIN,  
WILLIAM G. HENSHAW, TYLER HEN-  
SHAW, GEORGE T. CAMERON, FRED  
H. MUHS, J. C. EDEN, A. A. SUTHER-  
LAND, A. F. COATS, ALEXANDER  
BAILLIE, W. P. CAMERON, R. P.  
BUTCHART, and CLARK M. MOORE,  
Defendants.

**Assignment of Errors of R. P. Butchart, Defendant.**

Comes now R. P. Butchart, defendant in the above-entitled cause, and plaintiff in error upon



writ of error prosecuted by him in the above-entitled cause, and makes and files the following assignment of errors upon which he relies in the prosecution of said writ of error:

I.

The District Court erred in overruling the demurrer of this defendant to the indictment found by the grand jury in the above-entitled cause.

II.

The District Court erred in overruling the objection of this defendant to the introduction of any evidence in this cause upon the ground that the indictment does not state facts sufficient to charge a crime of any kind or any violation of the law, which objection was made in open court before any evidence was admitted in said cause.

III.

The District Court erred in admitting in evidence a letter written by the agent of the Riverside Portland Cement Company to Tyler Henshaw from Portland, dated April 1, 1914, and in overruling the objection of this defendant to the [690] admission of said letter and permitting said letter to be read to the jury. The said letter was marked Plaintiff's Exhibit 1, and in substance confirms a telegram advising new market price in Portland \$1.70 net, states said price quoted openly and apparently on instructions to California representatives from San Francisco, and further says that the Olympic and Washington representatives claim they had no instructions to make this price and would need such instructions if officially informed

to do so; it also refers to quotations on the Meier & Frank job.

#### IV.

The District Court erred in overruling the objection of this defendant to a letter written by Jones, agent for the Riverside Portland Cement Company in Portland, to Tyler Henshaw, dated April 7, 1914, and in admitting said letter in evidence and allowing same to be read to the jury. The substance of this letter refers to seeing Hacker, who stated that Seattle price was \$1.60 f. o. b. dock, apparently the result of a fight between Washington mills; that there was no reduction in Portland probably for lack of business, and that Washington mills asserted that their Seattle price would apply to Portland, and that the writer expects a drop in the Portland market; also, in overruling the objection of this defendant to a letter from said Henshaw to said Jones, dated April 11, 1914, and admitting said letter in evidence and to be read to the jury. Both of these said letters are marked exhibit 2. The substance of the said letter of April 11, 1914, is to acknowledge the information contained in the letter of April 7, 1914, as to a fight against Warren Construction Company. [691]

#### V.

The District Court erred in overruling the objection of this defendant to a telegram sent by C. W. Jones, agent of the Riverside Portland Cement Company to Tyler Henshaw, dated April 19, 1914, and in admitting said telegram in evidence and in permitting the same to be read to the jury,

and in admitting in evidence the answer to said telegram of the same date, which said telegrams are marked Plaintiff's Exhibit No. 3, and the full substance of the same is contained in abstract of exhibits attached to and made a part of the bill of exceptions.

## VI.

The District Court erred in overruling the objection of this defendant to a letter written by C. W. Jones, agent of Riverside Portland Cement Company, to Tyler Henshaw, dated April 20, 1914, and admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 4, and the full substance thereof is set forth in abstract of exhibits attached to and made a part of the bill of exceptions.

## VII.

The District Court erred in overruling the objection of this defendant to a letter written by said Tyler Henshaw to the said C. W. Jones, dated April 25, 1914, which letter is marked Plaintiff's Exhibit 5, and in admitting said letter in evidence and to be read to the jury. The full substance of said letter is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## VIII.

The District Court erred in overruling the objection of this defendant to a letter written by Tyler Henshaw to [692] the said Jones, dated April 29, 1914, and in admitting said letter in evidence and to be read to the jury. Said letter is marked

Plaintiff's Exhibit 6, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

### IX.

The District Court erred in overruling the objection of this defendant to a letter written by said Tyler Henshaw to the said Jones, dated May 13, 1914, and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 7, and the full substance of the same is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

### X.

The District Court erred in overruling the objection of this defendant to certain telegram and letters from C. W. Jones to Tyler Henshaw, dated May 21, 1914, and in admitting said telegram and letters in evidence and in permitting the same to be read to the jury, which telegram and letters are marked Plaintiff's Exhibit 8, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

### XI.

The District Court erred in overruling the objection of this defendant to a telegram from said C. W. Jones to the said Tyler Henshaw, dated May 27, 1914, and in admitting said telegram in evidence to be read to the jury. Said telegram is marked Plaintiff's Exhibit 9, and the subject matter of the same is fully set forth in the abstract of ex-



hibits attached to and made a part of the bill of exceptions. [693]

## XII.

The District Court erred in overruling the objection of this defendant to a letter written by said C. W. Jones to said Tyler Henshaw, dated May 28, 1914, which refers to the telegram mentioned in the last preceding assignment and discusses the Dinwiddie job and the Eden bid, and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 10, and the substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## XIII.

The District Court erred in overruling the objection of this defendant to a letter written by Tyler Henshaw to C. W. Jones, dated June 1, 1914, and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit No. 11, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## XIV.

The District Court erred in overruling the objection of this defendant to a telegram sent by C. W. Jones to Tyler Henshaw, dated June 1, 1914, and in admitting said telegram in evidence and to be read to the jury. Said telegram is marked Plaintiff's Exhibit 12, and the full substance of the same is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## XV.

The District Court erred in overruling the objection of this defendant to a letter written by Tyler Henshaw to C. W. Jones, dated June 11, 1914, and in admitting said letter in evidence and to be read to the jury. Said letter [694] is marked Plaintiff's Exhibit 13, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## XVI.

The District Court erred in overruling the objection of this defendant to a letter written by C. W. Jones to Tyler Henshaw, dated July 2, 1914, and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 14, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## XVII.

The District Court erred in overruling the objection of this defendant to a telegram sent by C. W. Jones to Tyler Henshaw, dated July 3, 1914, and in admitting said telegram in evidence and to be read to the jury. Said telegram is marked Plaintiff's Exhibit 15, and the full substance of the same is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## XVIII.

The District Court erred in overruling the objection of this defendant to a night lettergram sent by C. W. Jones to Tyler Henshaw, dated July 6,

1914, and in admitting said paper in evidence and to be read to the jury. Said paper is marked Plaintiff's Exhibit 16, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

XIX.

The District Court erred in overruling the objection of this defendant to a letter written by C. W. Jones [695] to Tyler Henshaw, dated July 6, 1914, and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 17, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

XX.

The District Court erred in overruling the objection of this defendant to a letter written to C. W. Jones by Tyler Henshaw, dated July 11, 1914, and in admitting said telegram in evidence and read to the jury. Said letter is marked Plaintiff's Exhibit 18, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

XXI.

The District Court erred in overruling the objection of this defendant to a telegram sent by Tyler Henshaw to C. W. Jones, dated July 11, 1914, and in admitting said telegram in evidence and to be read to the jury. Said telegram is marked Plaintiff's Exhibit 19, and the full substance thereof is set forth in the abstract of exhibits at-

tached to and made a part of the bill of exceptions.

## XXII.

The District Court erred in overruling the objection of this defendant to a telegram sent by C. W. Jones to Tyler Henshaw, dated July 31, 1914, and in admitting said letter in evidence and to be read to the jury. Said telegram is marked Plaintiff's Exhibit 20, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## XXIII.

The District Court erred in overruling the objection [696] of this defendant to a letter written by the Riverside Portland Cement Company to Walter Williams Hardware Company, dated August 1, 1914, and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 21, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## XXIV.

The District Court erred in overruling the objection of this defendant to a letter written by C. W. Jones to Tyler Henshaw, dated August 1, 1914, and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 22, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.



## XXV.

The District Court erred in overruling the objection of this defendant to a telegram sent by C. W. Jones to Tyler Henshaw, dated August 1, 1914, and in admitting said telegram in evidence and to be read to the jury. Said telegram is marked Plaintiff's Exhibit 23, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## XXVI.

The District Court erred in overruling the objection of this defendant to a telegram sent by Tyler Henshaw to C. W. Jones, dated August 1, 1914, and in admitting said telegram in evidence and to be read to the jury. Said telegram is marked Plaintiff's Exhibit 24, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.  
[697]

## XXVII.

The District Court erred in overruling the objection of this defendant to a telegram sent by Tyler Henshaw to C. W. Jones, dated August 7, 1914, and in admitting said telegram in evidence and to be read to the jury. Said telegram is marked Plaintiff's Exhibit 25, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

## XXVIII.

The District Court erred in overruling the objection of this defendant to a letter sent by C. W. Jones to Tyler Henshaw, dated August 17, 1914,

and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 26, and the substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

### XXIX.

The District Court erred in overruling the objection of this defendant to a letter written by Tyler Henshaw to C. W. Jones, dated August 19, 1914, and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 27, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions.

### XXX.

The District Court erred in overruling the objection of this defendant to a letter written by C. W. Jones to Tyler Henshaw, dated August 24, 1914, and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 28, and the full substance thereof is set forth in the abstract of exhibits attached to and made a part of the bill of exceptions. [698]

### XXXI.

The District Court erred in overruling the objection of this defendant to a letter written by William G. Henshaw to C. W. Jones, dated November 16, 1914, and in admitting said letter in evidence and to be read to the jury, the substance of which letter is that the Riverside Portland Cement Company has decided to drop out of the Portland market, and directing the agent to make

no further quotations, and to advise the amount of cement on hand and the commitments outstanding. The said letter is marked Plaintiff's Exhibit No. 30.

### XXXII.

The District Court erred in overruling the objection of this defendant to a letter written by C. W. Jones to Tyler Henshaw, dated December 5, 1914, and in admitting said letter in evidence and to be read to the jury, and in overruling the objection of this defendant to a telegram of the same date, and in admitting said telegram in evidence and to be read to the jury. The full substance of said letter is that Eden, Coats and Cameron of Balfour, Guthrie & Company left on the Shasta on that date for San Francisco, and that Jones would be in San Francisco on Thursday morning with data. This letter and telegram are marked Plaintiff's Exhibit 31.

### XXXIII.

The District Court erred in overruling the objection of this defendant to a letter written by Riverside Portland Cement Company to A. C. Steckle, of Battleground, Washington, dated March 18, 1915, and in admitting said letter in evidence and to be read to the jury. The full substance of this letter is acknowledging an order for cement and stating that the Riverside Company had withdrawn from the market and that [699] rather than delay shipment the order had been referred to Henry Cowell Cement and Lime Company. This letter is marked Plaintiff's Exhibit 32.

## XXXIV.

The District Court erred in overruling the objection of this defendant to a letter from C. W. Jones to Tyler Henshaw, dated March 9, 1915, and in admitting said letter in evidence and to be read to the jury. The full substance of this letter is in regard to freight reduction on Interstate Bridge contract. This letter is marked Plaintiff's Exhibit 33.

## XXXV.

The District Court erred in overruling the objection of this defendant to a telegram from William Pierce Johnson to Tyler Henshaw, dated June 5, 1915, and in admitting said telegram in evidence and to be read to the jury, and in overruling the objection of this defendant to a letter from said Henshaw to said Johnson in answer to said telegram. Said telegram and letter are marked Plaintiff's Exhibit No. 34. The full substance of this telegram is that the sender has a price of \$1.95 less 1% f. o. b. Portland for 1300 barrels of cement, sacks extra, and asks Tyler Henshaw to assist him, and further states that he expects to require about 3,000 sacks for San Francisco delivery in the near future. The full substance of the day letter in answer thereto is that Henshaw is sending the Portland order to C. W. Jones personally, that the order could not go through the San Francisco purchasing order and that the Riverside Portland cement could not be furnished but some other California brand, and that Jones could probably help out to the extent of about 20¢ per barrel. [700]



## XXXVI.

The District Court erred in overruling the objection of this defendant to a day letter sent by C. W. Jones to Tyler Henshaw, dated July 6, 1915, and in admitting said day letter in evidence and to be read to the jury. The full substance of this day letter is that the representatives from every cement mill in the Pacific northwest were in San Francisco on that date, and the sender thought that Henshaw might like to know this fact. This day letter is marked Plaintiff's Exhibit No. 35.

## XXXVII.

The District Court erred in overruling the objection of this defendant to a letter from the Bend Company to Riverside Portland Cement Company, dated August 20, 1915, asking for quotations, and the answer from the Riverside Portland Cement Company to the Bend Company, dated August 25, 1915, stating that the Riverside Company is not in a position to quote as it had withdrawn from the cement market in this territory, and refers to the possibility of another cement company entering this market; and the said Court erred in permitting said letter and the answer thereto to be admitted in evidence and to be read to the jury. Said letter and answer thereto are marked Plaintiff's Exhibit 36.

## XXXVIII.

The District Court erred in overruling the objection of this defendant to a letter from Riverside Portland Cement Company to the Bend Company, dated August 23, 1915, to the effect that the Riverside Company never handled lime and plaster and

had referred the inquiry of the Bend Company to J. McCracken Company, the exclusive agent for Roche Harbor lime, and in admitting said letter in evidence and to be read [701] to the jury. This letter also states that there is a strong possibility of another cement company entering this field in the very near future. In connection with this letter there was a letter also introduced in evidence and read to the jury from the Bend Company to the Riverside Portland Cement Company, dated August 20, 1915, requesting quotations on cement, lime, plaster, etc. These letters are marked Plaintiff's Exhibit No. 37.

### XXXIX.

The District Court erred in overruling the objection of this defendant to any evidence regarding the Interstate Bridge between Portland and Vancouver, and particularly the evidence of the witness C. F. Swigert, in regard to buying cement from International Portland Cement Company for \$1.65 per barrel delivered at Portland on condition that the freight rate on such cement from Spokane to Portland should be 13½¢ hundred, and all evidence of every kind in regard to cement furnished for said Interstate Bridge or in regard to the negotiations between the witness Swigert and cement companies other than the Oregon Portland Cement Company for the purchase of said cement for said purpose; and in admitting any evidence in regard to said matters and in regard to the proposed freight rate on cement from Spokane to Portland. Said evidence is set forth in full in the bill of exceptions,

and the substance of it is that the witness purchased the cement for this purpose from the International Portland Cement Company of Spokane at \$1.65 per barrel delivered in Portland; that he had quotations from other cement companies ranging from \$1.90 to \$1.75, that the price in Spokane at [702] that time ran from \$1.08 to \$1.15, as there was a bitter fight between the International Portland Cement Company and the Lehigh Portland Cement Company; that the witness went to the Spokane, Portland & Seattle Railway Company's officials, and they agreed to put in this rate of 13½c per hundred from Spokane to Portland on cement; that he also, lined up about 60,000 barrels of cement, all subject to this rate going into effect; he saw some of the Washington Portland Cement Company people, among others Mr. Coats, and that Coats said that if he would not insist upon Skinner, the agent of the Spokane, Portland & Seattle Railway Company, putting in this rate he would see that the witness was protected in price; that the cement supplied to him was almost entirely Superior cement, a Washington product, or Santa Cruz cement, a California product, and that he paid for this cement \$1.65; that he never got any cement afterwards as cheap; that orders were placed with International Portland Cement Company, but the cement was furnished by the Superior Company or Santa Cruz Cement Company upon these orders, mostly Santa Cruz cement, and that subsequently the orders were placed directly with the Santa Cruz

Company in Portland or with Mr. Bennett, agent of the Superior Company in Vancouver.

#### XL.

The District Court erred in overruling the objection of this defendant to a contract between the Superior Portland Cement Company and the Pacific Bridge Company, and in admitting said contract in evidence and to be read to the jury. Said contract is marked Plaintiff's Exhibit 38, and in substance is a contract between the Superior Portland Cement Company and the Pacific Bridge Company whereby Superior [703] Portland Cement Company agreed to furnish cement to the Pacific Bridge Company for building the substructure of the Interstate Bridge between Portland and Vancouver at a price of \$1.65 a barrel.

#### XLI.

The District Court erred in overruling the objection of this defendant to a letter, dated December 28, 1914, written by Henry Cowell Cement Company to the Aberdeen Manufacturing Company, of which company F. M. Wylie was the manager, in which letter the writer advised that the Henry Cowell Lime & Cement Company would not furnish cement to the Aberdeen Manufacturing Company after January 1, 1915; and erred in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit No. 39.

#### XLII.

The District Court erred in overruling the objection of this defendant to a letter to the Treasury Department, dated February 2, 1915, marked Plain-



tiff's Exhibit 40, and in admitting said letter in evidence and to be read to the jury. Said letter is as follows:

“Treasury Department,  
Washington, D. C.

Gentlemen:

We the undersigned dealers in building materials of this city wish to report to you the predicament we find ourselves in at the present time due to a combination made to control the sale of all cement here and also in the adjoining city of Hoquiam. This combination apparently being entered into by the following well known manufacturers of cement: The Superior Portland Cement Company, The Washington Portland Cement Company, and the Olympic Portland Cement Company of this state with head offices in Seattle; [704] The Pacific Portland Cement Company with offices at San Francisco and also the F. G. Foster Company of Hoquiam, Washington, the latter dealers in building materials.

Now this city has been supplied through the undersigned in the past with Washington and California manufactured cements. The T. B. Darragh Company selling the cement of the Pacific Portland Cement Company. The Aberdeen Manufacturing Company selling the cement of the Henry Cowell Lime & Cement Company, and the W. R. Lebo Company selling the cements of all three of the mentioned Washington Companies.

The first of the year saw the following changes here due to this combination. Cement was raised

30c per barrel to the consumer, from \$1.90 to \$2.20 net. The agency held by the Lebo Company of the three Washington cements was taken away from them and given to the F. G. Foster Company who then opened up a branch business here with a stock of building materials. The Pacific Portland Cement Company notified the Darragh Company that they must quote cement no cheaper than \$2.30 net, or 10c above the Foster Company price, which naturally eliminated the Darragh Company from securing any cement business. The Henry Cowell Lime & Cement Company wrote the Aberdeen Manufacturing Company that they had withdrawn from the Washington market and that they would ship no more cement to Aberdeen. Now this action was taken by the California companies the first of the year in spite of the fact that they could get the business at a 30c per bbl. advance in price and a 50c per bbl. advance over what they received for cement here during most of the year 1914, the price then being \$1.70 net. Also, these same California Companies are to-day shipping cement [705] into Portland, Oregon, at a higher freight cost from San Francisco than the freight cost is to Aberdeen and receiving for this cement in Portland 30c per bbl. less than they can get it in Aberdeen, under the present prevailing market price.

This combination is going to work a great hardship upon us for the following reasons: We deal in all kinds of building materials and as most orders in a city the size of Aberdeen are mixed orders, consisting of cement, lime, brick, etc., etc., a buyer

in nearly every instance wants his requirements from one place and as cement is usually the chief item, this combination is going to stifle competition and give the Foster Company a leverage that must soon draw the bulk of the building material business to them, to the demoralization and perhaps ruin of our business.

Now this combination must certainly be illegal and we are therefore writing you and requesting that your Department investigate this matter and if possible get relief for us.

Yours very truly,

ABERDEEN MANUFACTURING COMPANY,  
\_\_\_\_\_, Mgr.

W. R. LEBO & COMPANY,  
\_\_\_\_\_, Mgr.

T. H. DARRAGH COMPANY,  
\_\_\_\_\_, Mgr."

#### XLIII.

The District Court erred in overruling the objection of this defendant to the following question propounded to the witness J. G. Bennett, a witness on behalf of the United States:

Question: "What did he say to you about it?" [706]

and in permitting said question to be answered and in admitting in evidence the answer of said witness. The substance of this testimony is that Mr. Lille, a salesman of the Superior Portland Cement Company, made a trip to Vancouver, Washington, and informed said witness that the fighting methods between cement manufacturers were done, and that

there would be a new deal on, and gave the witness to understand that there was a meeting in San Francisco of Washington and California cement manufacturers about the beginning of 1915, and that there would be an adjustment of prices and prices would be much higher and that there would be no deviation from the prices, and advised witness to buy all he thought he could handle; he bought accordingly at \$1.55, and shortly afterwards had a wire that the price would be \$1.90 with the usual dealers' commission.

#### XLIV.

The District Court erred in overruling the objection of this defendant to a letter written by the witness J. G. Bennett to J. C. Eden and the reply of J. C. Eden to the same upon the back of said letter, and in admitting said letter and answer in evidence and to be read to the jury. The said letter and answer are marked Plaintiff's Exhibit No. 41, and are as follows:

"Vancouver, Washington, April 30, 1915.

Mr. Jno C. Eden,

Seattle, Washington.

Dear Sir:

We wrote your firm asking about the situation in regard to the bridge cement. We have answer saying the rate question had not been settled yet and ending as follows: [707]

If, however, coast cement should be used, we would in all probability have to put it through our



Portland representative, viz., Balfour-Guthrie Company.

(Signed) SUPERIOR PORTLAND CEMENT COMPANY.

A. A. SUTHERLAND.

This does not worry us any as we have been told by both yourself and Mr. Barnes that if Superior Cement is used it will be handled by us. However it looks to us as if your Mr. Sutherland was trying to lose your remaining Vancouver customer.

Very likely it is a California proposition by this time anyway, as the writer saw a schooner unloading cement at the Pacific Bridge Company dock yesterday, but if there is anything doing for us we would like to know about it and not be kept in the dark.

Very truly yours,  
BENNETT HDW. CO.

J. G. BENNETT."

"May 5, 1915.

My dear Bennett:

I have yours of the 30th, in regard to cement for the Interstate Bridge. As you doubtless are aware, a contract was entered into between the Pacific Bridge Company and other Portland contractors with the International Portland Cement Company of Spokane, covering their entire requirements.

While it is possible that some of these contracts may be assigned to us, you I think will agree with me that inasmuch as you had nothing to do with the making of the contract between the Bridge Company and the International Company, you would

not be entitled to any commission, particularly as we would doubtless have to pay the International [708] something for making the assignment.

However, the fact is I am quite sure the Bridge Company, if any assignment is made, will insist upon being given either Standard or Santa Cruz cements, as the manufacturers of those brands dock practically all of their cement in the dock of the Pacific Bridge Company in Portland.

Under the circumstances, don't you agree with me that we could not afford to pay two commissions on an order which your firm had nothing to do with placing?

Yours truly,

JCE\*T.

\_\_\_\_\_,  
President."

#### XLV.

The District Court erred in overruling the objection of this defendant to a letter offered in evidence by the United States addressed by Bennett Hardware Company to the Superior Portland Cement Company and the answer on the back of it, and in admitting said letter and answer in evidence and to be read to the jury. The substance of this letter was in regard to the Crown Willamette Paper Company desiring several thousand barrels of cement for work at Camas, Washington, and that it was probable they would buy California cement in Portland using steamers from Portland, and the answer on the back of the letter, which letter is dated April 19, 1916, was to the effect that though Camas was regarded in the territory of the Superior Portland

Cement Company, the relations between some of the officers of the Crown Willamette Paper Company and the California companies was so friendly that they could not meet the situation. Said letters are marked Plaintiff's Exhibit 44. [709]

#### XLVI.

The District Court erred in overruling the objection of this defendant to a letter from Bennett Hardware Company to J. C. Eden, dated April 30, 1915, and in admitting said letter in evidence and to be read to the jury. This letter is marked Plaintiff's Exhibit 41, and the substance of it is stated in the abstract of exhibits attached to and made a part of the Bill of Exceptions.

#### XLVII.

The District Court erred in overruling the objection of this defendant to a letter written by the Bennett Hardware Company to the Superior Portland Cement Company, dated August 9, 1916, and in admitting said letter in evidence and to be read to the jury. Said letter is marked Plaintiff's Exhibit 45, and is as follows:

“Vancouver, Washington, August 9, 1916.  
Superior Port Cement Company,  
Seattle, Washington.

Dear Sirs:

We wired you for a car of cement for the Camas job but ship to Vancouver and we will divert it.

The contractor made arrangements with E. & L. at Portland to test it and they said that they now had a man at Concrete to attend to it.

Pac. Br. Co.

Saw Mr. Swigert yesterday and he said that he would give you more cement business when he moved across to this side.

The enclosed card was left today and the gent said that he was on his way to cover the territory as far as Olympia.

BENNETT HARDWARE COMPANY,  
General Hardware and Builders' Supplies.

Just noticed that the stationery was printed double but it is too late to turn back now.

Vancouver, Washington.

Very truly yours,

GUY BENNETT.

Kindly say [710] when can ship above cement.  
(Enclosed card)

C. T. Hollister, 1104 Wilcox Building, Portland, Oregon, Representing Oregon Portland Cement Company."

#### XLVIII.

The District Court erred in overruling the objection of this defendant to a letter identified by the witness Farrington, and in admitting said letter in evidence and to be read to the jury. This letter was written by Santa Cruz Portland Cement Company to F. T. Crowe & Company of Portland, Oregon, dated April 25, 1914, and the full substance of the letter is in regard to a party named Williams of Newport who was buying cement in twenty-five barrel lots, and stated that the writer did not consider that he was entitled to any better price, and despite what anyone else was going to do Santa



Cruz Company are going to use its influence to bring about proper sales conditions in the territory which it served. This letter is marked Plaintiff's Exhibit No. 46.

#### XLIX.

The District Court erred in overruling the objection of this defendant to a letter written by the Santa Cruz Portland Cement Company, dated July 9, 1914, and in admitting said letter in evidence and to be read to the jury. The substance of the letter is a confirmation of verbal reduction making the price \$1.90 including sacks, ex dock, price to apply from day to day, job contracts closed at \$2.10 ex dock, and for 1915 delivery to be \$2.30 ex dock. This letter is marked Plaintiff's Exhibit 47.

#### L.

The District Court erred in overruling the objection of this defendant to a letter written by the Santa Cruz Portland Cement Company to the witness Farrington, dated July 31, 1914, [711] and in admitting said letter in evidence and to be read to the jury. The full substance of this letter is set forth in the abstract of exhibits attached to the Bill of exceptions. This letter is marked Plaintiff's Exhibit 48.

#### LI.

The District Court erred in overruling the objection of this defendant to a letter dated March 24, 1914, written by Superior Portland Cement Company to F. T. Crowe & Company at Tacoma, quoting a reduction from \$1.60 to \$1.50 per barrel at the factory when the cement was purchased by a state or

county only, and in admitting said letter in evidence and to be read to the jury. This letter is marked Plaintiff's Exhibit No. 49.

### LII.

The District Court erred in overruling the objection of this defendant to a letter written by the witness Hacker to Fred R. Muhs, dated April 10, 1914, and in admitting said letter in evidence and to be read to the jury. The witness was the agent or dealer of the Santa Cruz Portland Cement Company, at Tacoma, Washington. The substance of this letter was to advise the California mills to put some cement into Puget Sound markets in order to take part in the fight then being carried on between two Washington companies, and also suggesting that the Washington companies were threatening to drive the California companies out of the Oregon market. This letter is marked Plaintiff's Exhibit No. 50.

### LIII.

The District Court erred in overruling the objection of this defendant to a letter written by the Superior Portland Cement Company, dated June 1, 1914, to F. T. Crowe & Company of Tacoma, and in admitting said letter in evidence and to be read to the jury. This letter quotes prices to the Olympic [712] Hardware Company and Gray at Puyallup of \$1.20 f. o. b. mill instead of \$1.10, saying \$1.10 was a railway price and adding that the writer had some hope of getting price matters straightened and getting down to some basis so that one might know

what the price of cement really is. This letter is marked Plaintiff's Exhibit 51.

#### LIV.

The District Court erred in overruling the objection of this defendant to a letter written by the witness Hacker to F. R. Muhs, dated July 2, 1914, and in admitting said letter in evidence and to be read to the jury. In this letter the witness discusses the fight between Coats of the Washington and Baillie of the Olympic, and agent of the Washington in Portland and of Galbraith Bacon & Company in Seattle. This letter is marked Plaintiff's Exhibit 52.

#### LV.

The District Court erred in overruling the objection of this defendant to a letter from the Olympic Portland Cement Company, signed Balfour Guthrie, to F. T. Crowe & Company, dated July 17, 1914, quoting price of \$1.90 net less 15¢ commission, sacks extra, and in admitting this letter in evidence and to be read to the jury. This letter is marked Plaintiff's Exhibit No. 52.

#### LVI.

The District Court erred in overruling the objection of this defendant to a letter written by the Superior Portland Cement Company to F. T. Crowe & Company of Tacoma, quoting \$1.90 net f. o. b. Seattle, dated July 17, 1914, and in admitting said letter in evidence and to be read to the jury. This letter is marked Plaintiff's Exhibit No. 54. [713]

#### LVII.

The District Court erred in overruling the ob-

jection of this defendant to a letter written by the witness Hacker at Tacoma to Fred R. Muhs of Seattle, dated July 23, 1914, and in admitting said letter in evidence and to be read to the jury. This letter acknowledges night letter received, and states that the witness is selling cement from day to day delivery at \$1.50 and upon future contracts at \$1.70, and is sending copy of this letter to Portland. In this letter the witness adds that the people in Washington have seen some wisdom, and prices in Seattle, Portland and Tacoma are \$1.90 firm, and that if the Washington mill would use policy which the witness had suggested to them these prices would stick. This letter is marked Plaintiff's Exhibit 55.

#### LVIII.

The District Court erred in overruling the objection of this defendant to a letter dated August 27, 1914, marked Plaintiff's Exhibit 56, and in admitting this letter in evidence and to be read to the jury. This letter was written by the Superior Portland Cement Company at Seattle to F. T. Crowe & Company at Tacoma, and in substance it refers to a telephone conversation and states that the Washington cement manufacturers had agreed among themselves that a certain order referred to in the letter should come to the Superior Portland Cement Company, stating that the Superior was putting in a bid of \$1.85½, Washington at \$1.97½, and the Balfour-Guthrie & Company at \$1.90 and requested Crowe & Company not to bid at all on this contract, or if they did bid to bid



slightly above the Superior Portland Cement Company. [714]

### LIX.

The District Court erred in overruling the objection of this defendant to a letter from Superior Portland Cement Company, dated Seattle, December 31, 1914, to Crowe & Company, of the same place, quoting price on cement effective January first, \$1.90 net, no commission, and a second letter bearing the same date from Olympic Portland Cement Company to the same party to the same effect, and a further letter from the Olympic Portland Cement Company to the same party, dated Seattle, January 4, 1915, acknowledging the letter of Crowe & Company, dated January 2, 1915, and stating that program properly outlined and that Olympic would sell in carload lots at \$1.90 to any consumer, leaving less than carload lots to dealers, and also a copy of the letter from Crowe & Company to the Olympic, dated January 2, and also a letter from the Superior Portland Cement Company dated Seattle, January 12, 1915, to Crowe & Company, at Tacoma, requesting Crowe & Company to confine their sales to Tacoma and that the Cement Company would appoint other agents at points outside of Tacoma, and that both other factories were adopting the same policy; and also a letter from the Superior Portland Cement Company dated Seattle, February 23, 1915, to said Crowe & Company, relating to the terms upon which its cement would be sold; and to admitting in evidence said letters and each of said letters and permitting the same and each of them to be read to the jury. Said

letters form one exhibit marked Plaintiff's Exhibit No. 57.

### LX.

The District Court erred in overruling the objection of this defendant to certain letters offered in evidence and to admitting said letters in evidence and to be read to the jury, which letters were offered as one exhibit and are [715] as follows: Letters from the Superior Portland Cement Company, dated Seattle, January 13, 1916, to Crowe & Company, Tacoma, quotes price \$2.15 including sacks f. o. b. Tacoma, allowance  $7\frac{1}{2}\phi$  per sack; also letter from Superior Portland Cement Company, dated Seattle, January 13, 1916, to Crowe & Company, Seattle, quotes \$2.30 f. o. b. Seattle including sacks, sack allowance  $7\frac{1}{2}\phi$ ; also a letter from Washington Portland Cement Company, dated Seattle, January 12, 1916, to Crowe & Company, Seattle, quotes price effective same date \$2.30 f. o. b. Seattle, including sacks, sack allowance  $7\frac{1}{2}\phi$ ; also letter Olympic Portland Cement Company, dated Seattle, January 11, 1916, to Crowe & Company, Seattle, quotes price \$2.30 f. o. b. Seattle, including sacks, sack allowance,  $7\frac{1}{2}\phi$ . Said letters offered as one exhibit marked Plaintiff's Exhibit No. 58.

### LXI.

The District Court erred in overruling the objection of this defendant to a question propounded to the witness Hacker as follows:

“Why did the Standard and Santa Cruz Companies leave the state of Washington?”  
and in permitting said question to be propounded

and to be answered, and the answer to be submitted to the jury. This testimony was to the effect that before the Washington Cement Companies were started Washington and Oregon were dumping grounds for California Companies; the California Companies selling into Montana and Idaho up to the point where they met eastern competition. When the Washington cement mills started, the California mills were restricted in territory where the Washington mills could supply cement cheaper by reason of freight rates. At that time the California companies were selling in eastern Washington [716] as far as Spokane, freight rates being such that the Washington companies could not sell in eastern Washington. Afterwards eastern Washington mills were started and they crowded the California mills out of that territory, but Portland was the last place to which the California mills could ship as a dumping ground, and for this reason it was impossible to maintain prices because of conflict between the dealers; that the dealers were urging cement companies to get together and maintain prices; and as the California mills continued to sell in Washington there was a fight between all the mills.

## LXII.

The District Court erred in overruling the objection of this defendant to certain letters marked Plaintiff's Exhibit 63 received by Galbraith Bacon & Company of Seattle, from Superior Portland Cement Company of Seattle, Washington Portland Cement Company of Seattle, Olympic Portland Ce-

ment Company of Seattle, all dated February 10, 1914, and giving the same price and commission to dealers; and in admitting said letters in evidence and to be read to the jury.

LXIII.

The District Court erred in overruling the objection of this defendant to a letter identified by the witness Eden, dated April 18, written by J. C. Eden to W. H. George, and a letter dated April 24 attached to the same, both offered in evidence together and marked Plaintiff's Exhibit 74, and the admission of said letters in evidence and the reading thereof to the jury. Said letters are as follows:

April 18, 1916.

Dear Will:

Was mighty sorry on my visit to San Francisco last week not to have had time to have a few minutes talk with you, not only to speak about the Association, but to thank you [717] personally for the wonderful party you gave us in San Francisco when I was there about two months ago.

Regarding the Association matters, I think your objection to any contribution in excess of  $\frac{1}{4}\text{¢}$  per barrel was the same as my own, viz,—that too much of the  $\frac{3}{4}\text{¢}$  voted at the Association meeting in New York last December was to be divided to national advertising and to other uses that were of very doubtful value in our particular section of the country. I sincerely hope that you will be in accord with all of those present at the meeting with Mr. Beck in San Francisco last week agreed to do.



So far as the Northwest is concerned, I am positive that the spending of the 80% of the  $\frac{3}{4}\text{¢}$  per barrel contribution will be a very good investment, and will enable us to reduce a good share of the direct expense we have been put to in each individual company attempting its promotion work.

I don't know whether you formed as favorable an impression of Mr. Beck as I did, but he certainly strikes me as being the right man in the right place, and I hope that you will join the rest of us in lending him your heartiest co-operation.

With kindest regards and hoping that I may see you again in a short time, I am,

Yours truly,

Mr. W. H. George, 2 Market Street,

San Francisco, California."

"U. P. Company,	1916 May 15 A. M. 7:20	Received
President's Office	Ret'd.....	Portland Cement
1916, May 15 A. M. 8:32	Answ'd.....	Association
Ref'd to .....		May 15, 1916
Answ'd.....		Noted BFA.

HENRY COWELL LIME AND CEMENT  
COMPANY,

2 Market street.

San Francisco, April 24, 1916.

Attention of Mr. J. C. Eden. [718]

Superior Portland Cement Company,  
Seattle, Washington,

My dear Jack:

Replying to yours of April 18th, beg to advise that on April 20th I wired Mr. Beck as follows:

‘We will stay with the Association under new plan until October first, the date when the year that we joined for is up. Will then consider the matter again. Am afraid local competitors will not stop private promotion.’

At first I was not sure about Beck, but the more I saw him the more I liked him and am willing to play the string out for the term of our enlistment of one year from October 1, 1915, to October 1, 1916.

Altogether I am free to confess that I am not quite sure as to the advisability of all this. I feel as tho a company like our own could probably to better advantage as far as its own interests were concerned, do its own promotion work, but I do realize that this looks like a selfish position, because if the others were all in the Association, promoting the Association work, we of course get some measure of benefit. This, at this time, is the real reason that keeps our company in the Association, with the further hope that during the balance of the time that we are in, that things will develop so that all hands will see the advisability of a Coast Association, as I thoroughly believe in this.

I hope before long to have an opportunity to discuss all of this personally with you.

Yours very truly,

W. H. GEORGE, Secretary.”

WHG-w.

#### LXIV.

The District Court erred in overruling the objection of this defendant to the introduction of cer-

tain papers identified [719] by the witness Eden marked Plaintiff's Exhibit 75, and to admitting said papers in evidence and to be read to the jury. These papers consist of telegrams passing between F. R. Muhs and J. C. Eden, of Kenny & Eden, between said Eden and one Coats, the president of the Washington Portland Cement Company, and between J. G. Woodworth, vice-president of the Northern Pacific Railroad Company, and said Eden; all of these papers related to the proposed freight rate upon cement from the International Portland Cement Company to the city of Portland to enable said cement company to deliver its cement to Portland to fulfill the contract of the Pacific Bridge Company, and show the effort made by the Washington companies and representatives of the Superior, the Washington and Olympic Cement Companies to prevent this rate being put in; and this defendant avers that the Court erred in admitting said papers or any of them in evidence and in admitting the same or any of them to be read to the jury.

#### LXV.

The District Court erred in overruling the objection of this defendant to certain papers identified by the witness Eden and marked Plaintiff's Exhibit 76, and to admitting the said papers in evidence and to be read to the jury. Said papers consist of certain correspondence passing between Aman Moore and J. C. Eden, dated March 25, 1916, and relate to the manner of supervising paving

work and contain the statement of Eden to the effect that inasmuch as his company would probably not participate in the cement business in Oregon, they could not see their way clear to assume any of the expense of promotion in Oregon.

#### LXVI.

The District Court erred in sustaining the objection of the United States to the introduction in evidence of certain papers identified by the witness Eden. These papers consist [720] of publications of the Portland Cement Association published and circulated by cement companies throughout the United States for the promotion of the use of cement and to educate the public in regard thereto.

#### LXVII.

The District Court erred in overruling the objection of this defendant to certain letters identified by the witness W. P. Cameron, to wit, a letter dated August 4, 1916, marked Plaintiff's Exhibit 78, and certain other papers offered therewith identified by said witness, marked Plaintiff's Exhibit 79, and in admitting said papers and letters in evidence and to be read to the jury. These letters consist of correspondence passing between Foster & Company of Hoquiam and the Washington Portland Cement Company, Olympic Portland Cement Company and the Superior Portland Cement Company of Seattle, dated in August and September, 1916. The substance of these letters was that Foster & Company were acting as dealers and distributors



of the cement of all three Washington companies in Hoquiam and that vicinity, giving each of said companies a fair share of the tonnage and putting all three companies upon the same footing.

## LXVIII.

The District Court erred in overruling the objection of this defendant to a carbon copy of letter written by Tyler Henshaw to R. P. Butchart, marked Plaintiff's Exhibit 89, and in admitting said letter in evidence and to be read to the jury. Said letter is as follows:

"September 24, 1914.

Mr. R. P. Butchart,

Care Vancouver Portland Cement Company,  
Victoria, B. C.

My dear Mr. Butchart:

I have been trying very hard to find an opportunity to run up to Victoria to see you for a day, but [721] have found it utterly impossible this time. I wanted to talk to you about two things—both are of a very intimate nature, but on account of the very warm feeling that I have for you, and which I trust is to some extent reciprocated, I would not hesitate to talk or write you, but of course I would much prefer to talk to you.

The first is in regard to Carl Leonardt. He is a very peculiar man. He has off and on been trying to start a cement plant somewhere in southern California. Why, I don't understand, for he certainly knows the conditions as well as any man. Southern California is as much overproduced as any other section of the coast. After

many abortive efforts to find a property, he finally located one apparently and seemed to have started in seriously to interest capital in it. This property is located out on Cajon Pass on the Santa Fe railroad. It is not particularly well located, being four or five miles from a railroad, in a desert section of the mountains where it would be inevitably hard to keep men at work. He cannot produce his cement ever anywhere nearly as cheap as we are producing it, although we will concede him just as good a quality. Now he is attempting to go into an already overloaded market. I don't understand some people in this way, however, I want to make my story as short as possible.

He came to San Francisco about two months ago and called in to see me. I asked him if he intended to put up a plant on his property, and he said yes. Then I went over the matter very friendly, kindly way with him; told him what the situation was; how terribly overburdened that section was with cement; how the mills already there would [722] have to wait ten or fifteen years until the demand grew up to the present output. All of which seemed to make little impression, but finally I said to him: Now, see here, Mr. Leonardt, we have been very loyal friends of yours; have given you your cement under the market right along; we have protected you in your business, and being a cement man, as you are, you are doing this with your eyes wide open, therefore, it is only fair for me to say to you this: that we will not stand patiently by and see you put up another mill and add

more trouble to our market. You have an indubitable right to put up a mill, but we have just as indubitable right to protect our market, and the moment you put your cement on the market we propose to put the price down where neither you nor ourselves can make any money, and we will continue it there.

Now, Mr. Butchart, I don't bluff. The situation there is so bad now with Colton and ourselves and the little Gordon state mill, that if Leonardt comes in with a mill we might just as well start in and clean up the situation one time as another and let the man with the longest pole take the persimmon.

Leonardt thought this over and finally intimated he thought I was about right in my attitude, and told me if I would come down in the course of five or six weeks we would go down to the property and sell it out to me. No price was agreed upon, but he stated positively he would do so. I went down south, telephoned him, and he came over to Riverside. We took a machine and went out there, and after looking over the property I told him I was ready to buy it and to name his price and terms. He then began to shy and finally told me he would be up to San Francisco in about two weeks and would then settle the matter with me, which could only mean he would sell it to me. I tried to urge him to close [723] up then but he would not do so, but he again promised that within two weeks he would be up and sell it to me. I even said to him,—you mean, you will sell this property outright to me, and he said, yes.

Now he is keeping out of my way. There is no question in my mind that he is going to try to interest capital. I don't think anybody would be foolish enough under the circumstances to go into the proposition with him. Freights are against him and he can't manufacture as cheaply as we can. My honest belief is that we can make \$300,000.00 a year and keep him out of the market, or make him sell below cost. I may be wrong, but I firmly believe it and propose to tackle it anyway if he bobs up.

Now, without betraying any confidence as far as Mr. Leonardt is concerned, can you tell me whether he said anything to you about his plans down here. If so, what they were and whether you inferred he was seriously contemplating putting up a mill. I know you will tell me whatever you can properly, and I don't ask of you anything that is not proper for you to tell me, but whatever you do tell me will not go under any circumstances beyond my brother and myself.

Now, secondly: This must be considered by you as strictly confidential, but I am writing you personally so that you will have a full knowledge of the situation here in Oregon, and I am writing you only from that standpoint and because of my warm personal friendship.

I have bought a property here which I have been testing for something like a year. It is a property which in combination with our clinker, makes a cement of a remarkably high type. In fact, Mr. Butchart, in many ways exceeds regular Portland



cement. This property will enable me to put a cement on the market here at a cost from 65¢ to 75¢ a barrel, not exceeding the latter price, and I think we can do it after a year's run, under [724] the former price. Mind you, I am only talking of prospects. We are testing the material carefully in all directions; putting it into walls, putting it into highways; testing it under most unfavorable conditions, and so far it has shown up wonderfully. I am perfectly candid, and always with you my cards are never anything but 'face up on the table.' I am not quite through with my experiments with this cement, but will have finished them within the next three or four months, and will have it in practical use unknown to anyone except a few engineers. Within the next three or four months, I will have had over a year's full test upon the material, all compression and tension tests, etc., and will be in a position to know exactly what the material is. I shall put it on the market in Portland at not over, I think, \$1.25 a barrel, and some of it for mass work, harbor work, street work, and the like, will be sold for probably \$1.00 to \$1.10 in this market.

Now, I have heard nothing further for many, many months about the prospects of this Portland Cement Company here. I have understood you are not interested in this company here any further, although my information, naturally was not authentic, but anyway I want you to know privately and confidentially what my prospects are here, so that at least if you were contemplating any

movement in regard to this cement plant, you would have full knowledge for your own personal benefit of what my prospects were. The whole plant that I will put up will not cost over \$100,000.00, and my estimates already made and carefully checked, do not exceed \$75,000 for a plant to produce safely 400,000 barrels per annum. [725] I will say this further, that I do not expect to put on the market over 200,000 to 300,000 barrels per annum anyway, but *if* this cement turns out as every test shows it to, covering a period of eight months or more, and *if* I can produce it with as little original investment, and *if* this little affair starts in without a dollar of indebtedness of any sort, and *if* I can produce it at the price I have stated or lower, it would be a serious competitor for any cement mill to face.

If there is anything further you would particularly like to know about it, write me any question and I will gladly answer you fully.

Regretting exceedingly that I did not find the time to run up and discuss these matters with you, and with warmest personal regards, I beg to remain,

Yours very sincerely,

P. S.—In reading this letter over, while I have written it only from the friendliest motives, I fear it may sound to you in the nature of a possible menace. I hope you know me well enough to believe that nothing of the kind is intended. The reason that I am writing is feeling that as I have a warm personal friendship for you, it seemed only

justice to that friendship to tell you confidentially the prospects that were before me in this market in the cement line. I can see no reason why there should not be room for us both, and as indicated I do not intend to come in here and try to supply the entire market. In fact I know perfectly well that it would be impossible for me to do so, but at the same time I hope you understand that I am only telling you of these prospects (of course they are as yet only prospects) that might to some extent militate against any program you had set out in this market, if you are still connected with the Portland Cement Company here. [726] You know that you and I could work side by side in this market without any trouble. I feared you might, if I said nothing about this beforehand, feel that I had failed in the matter of friendship to you in not letting you know confidentially and beforehand."

## LXIX.

The District Court erred in sustaining the objection of the United States to a certain letter identified by the witness Aman Moore, written by Wirt Minor to Aman Moore, dated July 25, 1916, which letter is as follows:

"July 25, 1916.

Mr. Aman Moore,

Care Mr. Coy Burnett,

Lewis Building, Portland, Oregon.

Dear Sir: I am in receipt of communication dated July 24th addressed to the Directors of Oregon Portland Cement Company and signed by yourself,

in which you demand that an immediate directors' meeting be called for the purpose of obtaining various data from the parties named; that is to say, Mr. R. P. Butchart, Mr. Newlands, Mr. Macdonald, Mr. Clark M. Moore, and Mr. Ballard to the end that suit may be instituted under the Federal 'Treble Damage Statutes' for the damages sustained by the company through alleged illegal agreement on the part of the gentlemen above named.

This matter was brought before the Board informally at its last meeting and you were requested by myself to state what action you desired to take but for some reason you did not see fit to do anything whatever.

The by-laws of the corporation, article IV, section 4, provide that

'Special meetings of the board of directors shall be called by the Secretary when he is [727] requested so to do by the president, on three days' notice to each director.'

Special meetings shall be called in like manner on request of a majority of the members of the board. You are aware that the president of the corporation is now absent. You yourself are one of its vice-presidents. Section 2 of article VI of the by-laws provides that

'In the event of the absence of the president, one of the vice-presidents shall exercise the powers and perform the duties of the president during such absence, subject to the advice and control of the board or of the executive committee.'



You, therefore, have it in your power to call this meeting and I shall be pleased to have you do so. If you are not willing to take the responsibility of calling the meeting, I am perfectly willing to be one of a majority of the board to call such meeting. It will require this call to be signed by five of the directors. Mr. Butchart is away; Mr. Bates has tendered his resignation, but it has not been accepted as yet at your instance; Mr. Wilson has tendered his resignation, but the same has not yet been accepted; and Mr. Johnson is away. It will therefore be necessary for you to be one of the five directors to join in the call.

If you desire to have the meeting called, as suggested, and will come to my office, I shall take pleasure in preparing the call and in signing it. I do not know, however, whether Mr. Butchart and Mr. Newlands, who are charged by you with malfeasance in office, will consent to sign such call or not; if not, you will have to procure the signatures of Messrs. Wilson and Bates. [728]

As Mr. Butchart and other directors are charged with malfeasance in office, I think it will be but reasonable that the meeting when called shall be called for such time as to give these parties an opportunity to attend and respond in person.

Yours very truly,

WIRT MINOR."

WM/R.

LXX.

The District Court erred in sustaining the objection of the United States to the introduction in evi-

dence of the letter offered by the defendants written by Wirt Minor to Aman Moore, dated August 29, 1916, and in refusing the said letter to be identified or introduced in evidence. This letter is as follows:

August 29, 1916.

“Mr. Aman Moore,  
Oswego, Oregon.

Dear Sir: As one of the directors of the Oregon Portland Cement Company and as one of its general attorneys or counsel, I hereby demand that you afford me an opportunity to investigate the facts upon which the suit brought by you in the name of the Oregon Portland Cement Company is based. In connection with this demand I also demand that you afford me an opportunity to examine all the evidence from which these facts have been deduced or inferred.

I also desire you to advise me by what authority this action was commenced, for as you are aware it was commenced without consulting the Board of Directors. I should be pleased to confer with your attorneys at any time regarding the matter and to examine the evidence in their offices and to this end I am sending a copy of this letter to each of your attorneys of record.

I will add that I have been requested to take this step by several of the directors of the corporation.

Yours truly,  
WIRT MINOR.”

WM/MH. [729]

## LXXI.

The District Court erred in overruling and denying the motion of this defendant to instruct the jury to disregard all correspondence between Aman Moore and this defendant prior to the time that Clark M. Moore was elected Sales Manager in considering this case with reference to the guilt or innocence of Clark M. Moore, and that said correspondence should not be considered in arriving at the verdict as to the guilt or innocence of Clark M. Moore, and particularly to the statement made by the district court as follows:

“Of course any statements or admissions Mr. Butchart made before Mr. Moore became connected with this company would not be competent as admission of guilt against Clark M. Moore, but would be competent for the purpose of showing the status of the company and the condition at that time, and the admission made against the interest of Mr. Butchart.”

## LXXII.

The District Court erred in overruling the objection of this defendant to the introduction in evidence of a certain telegram and letter marked Plaintiff's Exhibit 104, and in admitting said telegram and letter in evidence and to be read to the jury. The telegram is dated San Francisco, August 2, 1915, and is addressed to W. R. Lebo at Aberdeen, and is as follows:

“Cannot accept contract, writing.”  
and the letter which refers to the telegram with-

draws a quotation of \$2.40 a barrel and quotes \$2.70 less usual sack allowance, dealers' commission and cash discount.

### LXXIII.

The District Court erred in overruling the objection of this defendant to certain correspondence passing [730] between Carl Leonardt and the witness W. H. George, consisting of a letter from George to Leonardt, dated February 1, 1916, and the answer thereto, dated February 7, 1916, and the reply to said answer, dated February 8, 1916, all of which were offered as one exhibit, and marked Plaintiff's Exhibit 105; and to the admission of said letters and each of them in evidence and to the reading of said letters and each of them to the jury. These letters are as follows:

“(In pencil)

L. B. 10/13/20.

HENRY COWELL LIME AND CEMENT CO.

2 Market Street.

San Francisco, February 1, 1916.

Mr. Carl Leonardt,

c/o Southwestern Portland Cement,

H. W. Hellman Building, Los Angeles.

My dear Mr. Leonardt:

I arrived home safely and want to thank you for your very kind and courteous treatment when I was at Los Angeles.

Please remember me kindly to Mr. Merrill and to Mr. Schirm.

I hope that by this time the get-together talk which I made it my particular business to give to



all of those who are in the lime business, is bearing fruit and that the conditions are better and settled.

I congratulate you on the layout and character of your new cement plant and trust that when she begins operation you will find a ready market for a reasonable output, at the highest price, and under regular terms and conditions.

Regarding regular terms and conditions: I enclose you herewith a little suggestion which I trust will be interesting. We have found it to work out to the best possible advantage here. [731]

I hope to be able to write you in a few days that the allowance for returned empty sacks has been changed to 7½ cents.

Again thanking you and conveying to you my best personal regards, I remain,

Yours very truly,

W. H. GEORGE."

WHG-W.

"Monday, February 7, 1916.

(In pencil)

L. B. 10/13/20.

Mr. W. E. George, Sec'y.

Henry Cowell Lime & Cement Company,

2 Market street, San Francisco, California.

My dear George: I received your letter of February 1st and thank you very much for the contents. That is the proper spirit! I refer to where you mention regarding our new cement plant that you 'trust when it begins operation we will find a ready market for a reasonable output,' etc.

Some of our cement manufacturers seem to think that no one else has a right to engage in the same business and manufacture and sell cement, which is entirely wrong as this is a free country and every man has a right to make an honest living and any combine to ruin a competitor by misrepresentation and crookedness is wrong, which soon or late they will find out to their sorrow if they do not change their tactics.

You know a good neighbor cannot live in peace if the bad neighbor does not want him to. The Portland plant as well as the Victorville plant wants to live in peace, but no man has the right to say that these plants have no right to manufacture or sell cement. These plants only want their rights which they hope to obtain by peaceful and harmonious methods. Of course you know what it means to a large manufacturer as compared to one that has less capacity, when it comes to price cutting. I leave it to you to say who can stand it the longest. [732]

I was in San Francisco last Saturday, leaving the same evening. I talked with your office, but you were at the factory. Mr. Butchart was with me and no doubt will write you from Del Monte. You can see him at any time and go into details with him, and should something of importance come up I will be willing to go to San Francisco at any time.

Wishing you success, I am,

Yours very truly,

---

President."

“HENRY COWELL LIME & CEMENT CO.

2 Market street.

San Francisco, February 8, 1916.

(In pencil)

L. B. 10/13/20.

Carl Leonardt, Esq.,

Pres. Southwestern Portland Cement Company,

710 H. W. Hellman Building, Los Angeles.

Dear Mr. Leonardt:

I am just in receipt of yours of February 7th and hasten to reply. I am willing to admit the truth of every word that you say and you know how I feel about these matters. I feel that that is exactly the way they should be carried out.

Undoubtedly by this time you have my other letter written from the plant on last Saturday.

At this writing I am at a loss to know where Mr. Butchart is. My understanding was that he was going to Los Angeles, probably with you from San Francisco, altho my first impression was that he was going direct to Los Angeles. I have written him in your care at Los Angeles, and am now awaiting results as to whether it is best for me to go to Los Angeles, to see him at Del Monte when he goes there, or to await his arrival [733] again at San Francisco.

When in Los Angeles I outlined to you what I wanted to say to Mr. Butchart, and I do hope that it will be agreeable and work to a satisfactory end. I shall be very glad indeed to advise you of all results.

Thanking you indeed for your many courtesies,  
I remain,

Yours very truly,  
W. H. GEORGE,  
Secretary."

WHG-w.

#### LXXIV.

The District Court erred in overruling the objection of this defendant to questions addressed to the witness W. D. Skinner, Traffic Manager of the Spokane, Portland & Seattle Railway, in regard to putting in a special rate on cement from Spokane to Portland in 1915 in order to get the haul of the cement for the Interstate Bridge, and to admitting said evidence or any thereof.

#### LXXV.

The District Court erred in overruling the objection of this defendant to the introduction in evidence of a certain paper marked Plaintiff's Exhibit 151, and to admitting said paper in evidence and to be read to the jury. The said paper is as follows:

"S. P. & S. will publish rate 13½ cents on cement c/l from Irwin, Washington, to Vancouver, Washington, and Portland, Oregon, if Irwin plant secures contract for interstate bridge cement. W. D. Skinner, F. T. M. Portland, Oregon, 3/6/15."

#### LXXVI.

The District Court erred in overruling the objection of this defendant to a certain paper offered in evidence by the United States marked Plaintiff's



Exhibit 152, and to admitting [734] said paper in evidence and to be read to the jury. This paper is a letter from the International Portland Cement Company to W. D. Skinner, in which they state:

“Have not secured contract, please publish rate with least possible delay.”

LXXVII.

The District Court erred in overruling the objection of this defendant to certain papers identified by the witness W. D. Skinner, marked Plaintiff's Exhibit 153, and in admitting said papers in evidence and to be read to the jury. Said papers were offered as one paper, and they consist of telegram dated March 11, 1915, from the International Portland Cement Company to said Skinner, as follows:

“Did not receive copy of traffic, must have effected earliest date.”

and the reply of said Skinner thereto as follows:

“Hands tied temporarily, will advise definitely few days.”

LXXVIII.

The District Court erred in sustaining the objection of the United States to a question propounded to the witness F. R. Muhs as follows:

Question: “Now, give the jury some idea of how profitable it has been, say how much money in proportion to the capital your mills have made?”

The witness had testified that the companies with which he was identified, the Santa Cruz Port-

land Cement Company and the Standard Portland Cement Company, after 1908 had made money, and the evidence sought to be elicited was for the purpose of showing that the amount of money made had been small as compared with the capital invested. [735]

### LXXIX.

The District Court erred in sustaining the objection of the United States to a question propounded to the witness F. R. Muhs, in which he was requested to tell the jury whether in his judgment, taking into consideration the cost of manufacturing and the freight which was paid on cement, the price charged by his mills was or was not a reasonable price.

### LXXX.

The District Court erred in sustaining the objection of the United States to testimony tendered by the defendants through the witness L. C. Newlands as to the reasonable cost of putting up the mill of the Oregon Portland Cement Company in 1915 and 1916, which evidence was offered for the purpose of showing the cost of the manufactured product, the defendants claiming that the cost or value of the factory is a proper element to take into consideration in ascertaining the cost of the manufactured product.

### LXXXI.

The District Court erred in the ruling of the Court excluding evidence offered by the defendants through the witness Ballard, that after he had made investigation into the affairs of the Oregon Port-

land Cement Company as Vice-President and Acting President of said corporation and had interviewed all the parties who were conducting the business of said corporation in order to ascertain whether or not the Oregon Portland Cement Company or its officers were violating the provisions of the law under which the indictment was found, that he found no evidence to sustain a charge of violation of this law, and in refusing to admit evidence to this effect.

LXXXII.

The District Court erred in sustaining the objection of the United States to the following question propounded to [736] the witness Ballard by the attorneys for the defendants:

Question: "What did you do, Mr. Ballard, in order to ascertain the price at which the Oregon Portland Cement Company's products were being sold?"

and erred in refusing said question to be answered and in refusing to allow the defendants to show by this witness the prices at which the Oregon Portland Cement Company's products were sold.

LXXXIII.

The District Court erred in sustaining the objection [737] of the United States to the following question propounded by the witness Ballard:

Question: "And what, if anything, did he say to you with regard to prices at which the products of the mill were to be sold?"

and in refusing to permit the defendants to show what Clark Moore told Mr. Ballard, Vice-President and Acting President of the corporation, in regard

to prices at which the products of the mill were sold. The testimony which was offered was for the purpose of showing that Clark Moore said nothing in regard to prices at which products of the mill were to be sold.

#### LXXXIV.

The District Court erred in overruling the objection of this defendant to the following question propounded to the witness H. S. McCracken:

Question: "At what price did you sell cement at that time?"

and erred in allowing said question to be answered. The witness McCracken was a dealer in cement in the city of Portland; he had testified in regard to prices which he paid for cement to the Oregon Portland Cement Company and other cement manufacturers; and the testimony admitted was to the effect that he sold cement at \$2.30 because he could get no more for his cement than other companies could get, that the California companies were selling cement in Portland through their own selling agencies, and were selling to the public at \$2.30.

#### LXXXV.

The District Court erred in sustaining the objection of the United States to the admission in evidence of a certain telegram offered by the defendants addressed to R. P. Butchart and signed by Charles Boettcher, E. Possett, and R. J. Morse, dated July 27, 1916. This telegram had been identified by the witness Wirt Minor as a telegram shown him or read to him [738] by Aman Moore at a meeting held in his office between Aman



Moore, Clark M. Moore, representing Mr. Boettcher, and Harry Ross, representing Mr. Butchart. This telegram is as follows:

July 27, 1916.

“R. P. Butchart,

Vanderbilt Hotel, New York City.

We have inspected your plant here and have no criticisms to make of Mr. Newlands' management but on account of notoriety of lawsuit and damage to company would recommend Aman Moore be placed in charge of plant and quarries leaving sales as at present and that you wire Mr. Newlands to resign and permit the election of some new member to Board of Directors. We have talked to number stockholders here and they are unanimous that settlement should be made with Moore to prevent notoriety and damage of his suit. Bank also refuses to extend loan unless assured suit will not be brought. We have looked over figures in office and find we must have at once fifty thousand dollars more to meet pay rolls and bills. Wilcox will loan part if board is reorganized. If change meets with your approval will you kindly wire Teal and Minor attorneys and stockholders to call meeting and reorganize board and appoint Moore superintendent.

C. BOETTCHER,

R. J. MORSE,

E. POSSETT.”

and erred in excluding said testimony.

LXXXVI.

The District Court erred in sustaining the objection of the United States to the admission in evi-

dence of a telegram from the witness Clark M. Moore to Grant Fee and of a letter from Grant Fee to the witness. These papers were marked defendants' identification 112 and 113 respectively, and were excluded by the ruling of the Court. In substance they relate to the proposed visit of Clark M. Moore to San Francisco [739] in August, 1916, and to a meeting which he wished to have with Grant Fee at that time with a view to selling him Oregon Portland cement for the erection of the Portland postoffice. The witness had testified in regard to the purpose for which he had gone to California, and among other things he went there to see Mr. Fee to sell him if possible the cement for the Portland postoffice, for which said Fee had obtained a contract.

#### LXXXVII.

The District Court erred in sustaining the objection of the United States to certain telegrams offered in evidence by the defendants, marked defendants' identifications 114 and 115, and to the exclusion of said telegrams from the evidence by the ruling of the Court. The witness Clark M. Moore had testified regarding a visit he made in August, 1916, to San Francisco, and among other objects of that visit was to see a Mr. Hiltz who was a representative of the Portland Cement Association on the Pacific Coast with a view to having him come to Portland and arrange for an inspector on some road work which was being done to see that the work should be done according to specifications, and in connection therewith the defendants offered in evi-

dence certain telegrams, as aforesaid, for the purpose of showing this to be, among other things, his object in going to San Francisco.

### LXXXVIII.

The District Court erred in overruling the objection of the defendant to excerpts from a letter written by the witness Clark M. Moore to Mr. Boettcher, dated May 18, 1916. This letter was written by Mr. Clark M. Moore to Mr. Boettcher after a meeting of the Portland Cement Association in Chicago, dated May 18, 1916, and said excerpts and letter are marked Plaintiff's Exhibit 163. [740]

### LXXXIX.

The District Court erred in that part of its charge to the jury as follows:

"It (the indictment) contains two counts: the first charges certain parties, managers, or representatives of cement manufacturing concerns in the states of Oregon, Washington, and California with entering into an unlawful combination or agreement in restraint of trade. . . . The second count charges the same parties by means of the same arrangement and combination with monopolizing the trade in cement in these several states."

### XC.

The District Court erred in that part of its charge to the jury as follows:

"Section 2 of the Act provides that every person who shall monopolize any part of the trade or commerce among the several states or with foreign nations, shall be guilty of a misdemeanor."

## XCI.

The District Court erred in that portion of its charge to the jury as follows:

“Now the second count of the indictment, as I have already said to you, charges the defendants with monopolizing the trade or commerce between the states, in violation of section two of the Act, which provides that all persons who shall monopolize or attempt to monopolize or combine with any person or persons to monopolize any part of the trade or commerce among the several states, shall be guilty of a crime. To constitute the offense of monopoly, under the Act, it is necessary to acquire exclusive right to such commerce by means which will prevent others from engaging therein. The popular meaning of monopoly is the [741] sole power of dealing in some particular commodity, in some particular market or place, or carrying on some particular business. Anything less than this is not a monopoly. The size of a business is not in itself a violation of this law. The act denounced by the statute is the certain and necessary prevention of other persons engaging in such business and thereby stifling or preventing competition. The evil against which the statute is directed is not the enlargement of the trade of one person, but the destruction of the trade of others, in some commodity. It is the suppression of competition by the unification of interest or management, or by agreement or concerted action. It signifies



the combining or bringing together into the hands of one person, or group of persons, the control, or the power of control, over a particular business or employment, so that competition may be suppressed by preventing others from engaging therein.”

## XCII.

The District Court erred in that part of its charge to the jury relating to the Portland Cement Company prior to the organization of the Oregon Portland Cement Company, and particularly to that portion as follows:

“There have been introduced in evidence some letters passing between Mr. Butchart and Mr. Aman Moore at a time prior to the date the Oregon corporation began marketing its product, and prior to the time that Clark Moore became connected with the concern.” . . .

“They are, however, evidence against Mr. Butchart, and may be considered by you for the purpose of showing the conditions as they existed at the time Clark Moore became Sales Manager of the Oregon Company.” [742]

## XCIII.

The District Court erred in that portion of its charge to the jury as follows:

“Certain letters have also been introduced in evidence, written by Aman Moore and addressed to Mr. Butchart, which contain statements or suggestions concerning fixing prices or allotment of territory, by agreement with other manufacturers. The statements or suggestions

contained in these letters are not evidence against Mr. Butchart, and do not tend to prove the connection of Butchart with any such agreement or combination, unless it appears that he acquiesced in the suggestion, or acted thereon, or combined with other manufacturers in accordance with the statements or suggestions so made by Moore.

Various letters have also been introduced written by officials, or associates of officials of cement manufacturers in Washington and California, to defendants Clark Moore and Butchart. Any statements, suggestions, or requests contained in any such letters are not to be taken or deemed as evidence of the guilt or innocence of the defendants Moore or Butchart, unless Butchart or Moore acquiesced in such statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions made or contained in the letters, but these letters are a part of the evidence, showing the relation existing between these people, and their conduct and actions, and for that purpose are competent and should be given such weight as you gentlemen may think they entitled to."

and the District Court erred particularly in that portion of the charge as follows:

" . . . but these letters are a part of the evidence, showing the relation existing between these people, and their conduct and actions, and for that purpose are competent and should be

given such weight as you gentlemen may think [743] they are entitled to.”

XCIV.

The District Court erred in its charge to the jury as follows:

“There has also been some testimony to the effect that charges of illegal combination were made to the directors of the Oregon Company in June, 1916, and perhaps later. These charges culminated, as you will recall, in certain suits or actions brought by Aman Moore against certain officers or directors of the Oregon Company, and also resulted in the appointment of a stockholders committee, to investigate these charges. The opinion of this committee, or of any director, as to the truth of the charges, is quite immaterial and should be disregarded by you. The fact that such charges were made, however, may be considered by you in connection with the manner of conducting the business of the company, and you may compare what was done before and after the charges were made and these suits filed, if there was any change in the manner of doing business, in passing upon the guilt or innocence of the defendants; and it is for you to determine whether sales, if any, made in Washington, after the making of these charges, were designed or intended for the purpose of evading such charges.”

and particularly the District Court erred in that portion of said charge as follows:

“ . . . The fact that such charges were made, however, may be considered by you in connection with the manner of conducting the business of the company, and you may compare what was done before and after the charges were made and these suits filed, if there was any change in the manner of doing business, in passing upon the guilt or innocence of the defendants; and it is for you to [744] determine whether sales, if any, made in Washington, after the making of these charges, were designed or intended for the purpose of evading such charges.”

XCIV.

The District Court erred in that portion of its charge, which is as follows:

“Mr. Butchart, however, while upon the stand, testified that he did not make certain statements attributed to him by Aman Moore, but said nothing about the letters written by him to Aman Moore, nor did he say anything about the meeting in San Francisco, referred to in these letters, nor offer any explanation of the letters, or any other statements contained therein. Now this was his privilege, and being a defendant he could not be required to say more if he did not desire to do so, nor could he be cross-examined as to matters not covered by the direct testimony, but upon passing upon the evidence in this case for the purpose of finding the facts, you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take



the witness-stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted, in that case, to comment unfavorably upon the defendant's silence. But where a defendant elects to come upon the witness-stand and testify he then subjects himself to the same rulings that apply to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by [745] the jury with all the circumstances, in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence, if there is any against him, he would have done so."

and the District Court erred particularly in that portion of the charges as follows:

" . . . Nor did he say anything about the meeting in San Francisco referred to in these letters."

#### XCVI.

The District Court erred in that portion of its charge wherein the Trial Court instructed the jury in regard to certain letters written by Aman Moore to R. P. Butchart, and which contain statements or suggestions concerning fixing prices by allotting territory by agreement with other manufacturers, and particularly to that portion of the charge wherein

the Court submitted to the jury said letters as evidence against the defendant R. P. Butchart, if

“it appears that he acquiesced in the suggestions, or acted thereon, or combined with other manufacturers in accordance with the statements or suggestions.”

### XCVII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing as follows:

“Portland cement is a mineral product. Certain earths or minerals, principally lime and clay, are mixed in specific proportions, fused by intense heat into a new uniform composition known as klinker and this klinker ground to an impalpable powder with certain ingredients added, is the Portland cement of commerce. It is sold by [746] barrels, for in the earlier stages of the industry the containers were always wooden barrels. The net content of such barrel was 376 pounds of cement. In the latter development of the industry the practice obtained and now rules upon the Pacific Coast of packing the cement in sacks, each sack weighing 94 pounds. Thus four of these sacks equal one barrel by the sales are still in terms of barrels, and mill capacity is spoken of in terms of barrels. When of a given mill it is said that it has a capacity of 1,000 barrels, it means that working to capacity that mill can output 1,000 barrels a day. In the sales of cement on the Pacific Coast provision is usually made to com-

pensate the ultimate purchaser for a return of sacks in good condition. In this regard the usual allowance is from  $7\frac{1}{2}$  to 10 cents per sack.

To the successful manufacturer of cement a factory requires its limestone quarry and its clay deposit; the other ingredients, such as gypsum, etc., usually being purchased abroad. The rough materials brought to the mill are subjected to a drying heat, to grinding to a given degree of fineness, to admixture in due proportions, and then to an intense heat in kilns. The product of this is known as klinker. The klinker marks the termination of the first stage in the production of cement. It may be heaped in piles and exposed to the air and improves rather than deteriorates by this from the beneficial chemical changes which result from the action of the oxygen in eliminating the free lime which the klinker may contain. In the second process of manufacture the klinker is ground to an extreme fineness, thoroughly mixed with the minor ingredients and transported to the warehouse or packing house as the completed product ready for the market. The principal ingredients [747] being furnished by the earth in a state of nature the cost of these in their primitive state is not as a rule great. That cost is principally composed of the investment in mill machinery and of labor. The mill machinery is complicated and expensive. Dryers, grinders, kilns, conveyors, etc. Much heat being neces-

sary, the fuel item is an extremely heavy one. Owing to the nature of the process by which cement is made the necessary application of intense heat, the kilns and other machinery are subject to rapid deterioration in use. The life of a cement mill in operation is ten years, or, in other words, the necessary renewals and replacements have in ten years substituted a completely new set of machinery for the original."

#### XCVIII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Portland cement is an article of commerce and under the law must be tested before it is placed upon the market and any brand of Portland cement which stands these tests and fulfils the requirements of the law can be used in all work in which Portland cement is used."

#### XCIX.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Every manufacturer has the right to ascertain in any legitimate way the price at which goods manufactured by others and competing with the product of his mills are sold. Competing manufacturers issuing price lists from time to time may legally exchange their respective price lists. Competing manufacturers may lawfully advise one another of the territory in which their manufactured products are mar-



keted and may lawfully advise one another of the prices at which their respective products are [748] put upon the market. Giving and receiving such information is not forbidden by law."

C.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"It is therefore a natural conclusion that the mere fact that a manufacturer of Portland cement in the State of California, Oregon, and Washington may have issued from time to time price lists or circulars stating the price at which and terms on which the product of his factory would be sold and that a similar price list or circular letter may have been issued by some or by all other manufacturers of Portland cement in said states and that in all of said price lists or circular letters issued at or about the same time the price of Portland cement is the same and the terms of sale the same, will not in itself constitute a violation of the statute or be in contravention of the law nor can you find the defendants guilty upon evidence of this character alone even though you should find that every manufacturer sold his product at the same price and upon the same terms. To constitute a violation of the law there must also be evidence which satisfies your minds beyond a reasonable doubt that such prices or terms were fixed by agreement or com-

bination between the several manufacturers and that defendants Butchart and Moore were parties to such agreement or combination."

#### CI.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Every manufacurer of Portland cement has the legal right to determine from time to time the territory in which [749] the parties to whom, the prices at which, and the manner in which the product of his factory shall be sold. He may also issue price lists or circulars and employ any other method which he may desire to advertise or sell the product of his mill. Such conduct is not a violation of the statute under which the defendants are indicted or in contravention of any law."

#### CII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Every commodity such as Portland cement is under normal business conditions put upon the market for sale and sold and the average price at which such commodity is sold is commonly designated as the market or market price. Under normal conditions Portland cement is sold in this manner and the price at which it is so sold from time to time would constitute the market price at the time. Such mar-

ket price naturally changes from time to time due to cost of manufacture, cost of transportation, supply and demand, and to other causes too numerous to enumerate. Each sale affects and therefore each manufacturer in offering and selling his factory's output necessarily contributes to making the market price and of course such action on his part is not in violation of law. It is only the making or fixing of the market price by agreement, combination or conspiracy with other manufacturers which is prohibited, so that if you are not satisfied by the evidence beyond a reasonable doubt that either of the defendants, Butchart and Moore, as officers or agents of Oregon Portland Cement Company did agree or combine or conspire with other manufacturers of Portland cement in the states above mentioned to make or fix the market price for Portland cement, or agree or combine or conspire with other manufacturers to limit the territory in which Oregon Portland Cement Company should sell its [750] products or agree or combine or conspire with other manufacturers to limit the territory or fix the price at which the products of the mill of some other manufacturers should be sold, you must return a verdict of not guilty."

### CIII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

“I have permitted the Government to introduce evidence tending to show that in 1915 the Spokane, Portland & Seattle Railway Company promised to reduce its freight charges upon Portland cement from Irwin, Washington, to Portland, Oregon, and Vancouver, Washington, and that the Western Washington Cement Manufacturers and some of the Northern California Cement Manufacturers combined to defeat such proposed change in the freight rate and that they succeeded in defeating the same by promising to supply cement from their mills for the Interstate Bridge at the price at which cement for this purpose was offered by the Irwin plant if the rate had been installed. Such action on the part of the Western Washington and California manufacturers, if proven to your satisfaction, would not constitute a violation of the statute on which this indictment is based.”

#### CIV.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

“There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the anti-trust act was passed, a definite legal signification. Not every combination in restraint of competition [751] is in restraint of trade. But it does not necessarily follow that restraint of competition is a restraint of interstate trade and commerce.



The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish interstate trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several states.' To what extent the anti-trust act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated, and it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

The language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. Restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade."

#### CV.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Even if you are satisfied from the evidence that there was an agreement or conspiracy or

combination or a concert [752] of action among the manufacturers of Portland cement in the states above mentioned to define the territory in which or the prices at which the product of the several factories or mills should be sold, yet such agreement, conspiracy, or combination is not necessarily within the prohibition of the statute, for to constitute a violation of the statute you must also be satisfied from the evidence beyond a reasonable doubt that said manufacturers thereby intended to restrain interstate commerce in cement in the market for Portland cement to an unreasonable degree or that interstate commerce in cement was thereby restrained to an unreasonable extent."

#### CVI.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"It is entirely lawful for anyone to do what he can to prevent a transportation company from putting in a freight rate which he may deem unjust and discriminatory, and which he may think will injuriously and unjustly affect his business. Any number of persons who may be similarly situated may join in opposing the installation of such freight rate. It is in evidence that the Western Washington Cement Manufacturers and some of the Northern California Cement Manufacturers combined in 1915 to defeat a proposed change or

reduction in the freight rate on cement from Irwin, Washington, to Portland, Oregon and Vancouver, Washington, but this action on their part was legitimate and lawful, and does not constitute any violation of the Sherman Act."

## CVII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows: [753]

"Manufacturers of Portland cement may lawfully ascertain the markets or territories in which and the price or prices at which other manufacturers of Portland cement sell or market their products, and having this information or knowledge may use the same in marketing their own product so long as they do not agree or combine or conspire with such other manufacturers, but act independently of them. It is only actions taken by agreement or combination or conspiracy with other manufacturers which the law prohibits."

## CVIII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"The indictment charges that an agreement, combination, or conspiracy was entered into between certain parties representing certain manufacturers of Portland cement in the states of California, Oregon, and Washington, to control or limit the territory in which the output

of the several factories should be marketed and to fix the prices at which it should be sold and that defendants Butchart and Moore as the officers and agents of Oregon Portland Cement Company were parties to or became parties to such agreement, combination, or conspiracy, and that such agreement, conspiracy, or combination was entered into for the purpose of restraining interstate commerce in Portland cement in said states and that such interstate commerce was thereby actually restrained. Before you can find either of the defendants Butchart or Moore guilty, you must therefore find or be satisfied by the evidence beyond a reasonable doubt, first, that such agreement, conspiracy, or combination was entered into by the defendants named in the indictments or by some of them; second, [754] that such agreement, combination, or conspiracy was entered into for the purpose of restraining interstate commerce in Portland cement in said states; third, that it did restrain or restrict such commerce; fourth, that the defendant or defendants Butchart and Moore were parties to or became parties to said agreement, conspiracy, or combination; fifth, that the defendant or defendants Butchart and Moore were parties to or became parties to said agreement, conspiracy, or combination as officers or agents of Oregon Portland Cement Company; and, sixth, that interstate commerce in said states in Portland cement would neces-



sarily be restrained or was actually restrained by such alleged agreement, conspiracy, or combination to an unreasonable extent or degree. If you find that one of the defendants Butchart or Moore was not a party to such agreement, combination, or conspiracy, you must find him not guilty, and if you find that neither of the defendants Butchart or Clark M. Moore was a party thereto, you must return a verdict of not guilty in favor of each of said defendants.”

### CIX.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

“There is no evidence in this case which tends to show that either R. P. Butchart or Clark M. Moore monopolized or attempted to monopolize the trade or commerce in Portland cement among the states or combined with any person or persons to monopolize any part of the trade or commerce in Portland cement among the several states. You will therefore return a verdict in their favor in the second count of of the indictment.”

### CX.

The District Court erred in refusing to charge the jury was duly requested by this defendant in writing, as follows: [755]

“The evidence before you is not sufficient to establish the guilt of the defendant R. P. But-

chart, and you are hereby directed to return a verdict in his favor of Not Guilty.”

CXI.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

“The evidence before you is not sufficient to establish the guilt of the defendant Clark M. Moore, and you are hereby directed to return a verdict in his favor of Not Guilty.”

CXII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

“Certain letters have been introduced, written by Aman Moore and addressed to R. P. Butchart, which contain statements or suggestions concerning the fixing of price, the allotment of territory, or agreements with other manufacturers. I instruct you that statements or suggestions made by Aman Moore recited or contained in such letters are not evidence against said Butchart and do not tend to prove the connection of said Butchart with any such agreements or combinations, unless it be further shown independent of such statements or suggestions so made by said Aman Moore and contained in said letters, that said Butchart acquiesced in said statements and acted thereon or combined with other cement manufacturers in accordance with the statements

or suggestions so made by said Aman Moore and contained in said letters."

CXIII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows: [756]

"Letters have been admitted in evidence written by Aman Moore to R. P. Butchart and by R. P. Butchart to Aman Moore dated prior to April 14, 1916, the date upon which Clark Moore was selected or appointed Sales Manager for the Oregon Portland Cement Company. Any statements contained in such letters or correspondence are not evidence for or against Clark Moore, unless you should find that such letters show a combination, conspiracy, or agreement as charged in the indictment, and that after Clark Moore became Sales Manager of the Oregon Portland Cement Company on April 14, 1916, he acted in furtherance of such combination or conspiracy and aided, abetted, or assisted in carrying out and performing the agreements so made."

CXIV.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Various letters have been introduced written by officials or associates of officials from cement manufacturers in Washington and California to defendants Clark Moore and R. P. Butchart. I instruct that any statements, sug-

gestions, or requests contained in such letters are not to be taken or deemed as evidence of the guilt or innocence of defendants R. P. Butchart and Clark Moore unless it be further shown by evidence independent of the statements contained in such letters that defendants Butchart or Clark Moore acquiesced in such statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions so made or contained in said letters."

CXV.

The District Court erred in overruling and denying [757] the motion and application of this defendant to set aside the verdict of the jury returned in this cause and grant a new trial to this defendant and in refusing to set aside said verdict and grant a new trial to this defendant.

R. P. BUTCHART,  
By WIRT MINOR,  
One of His Attorneys.

TEAL, MINOR & WINFREE,  
WIRT MINOR,  
A. B. WINFREE,

Attorneys for Defendant R. P. Butchart.

Service of the within assignment of errors and receipt of a copy is hereby admitted this 18th day of August, 1921.

HALL S. LUSK,  
Assistant United States Attorney,  
Of Attorneys for Defendants in Error.



Filed August 18, 1921. G. H. Marsh, Clerk.  
[758]

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AND AFTERWARDS, to wit, on the 18th day of August, 1921, there was duly filed in said court, an assignment of errors of Clark M. Moore, in words and figures as follows, to wit: [759]

In the District of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

S. H. COWELL, W. H. GEORGE, F. G. DRUM,  
R. B. HENDERSON, FRANK W. ERLIN,  
WILLIAM G. HENSHAW, TYLER HENSHAW,  
GEORGE T. CAMERON, FRED H. MUHS,  
JOHN C. EDEN, A. A. SUTHERLAND,  
A. F. COATS, ALEXANDER BAILLIE,  
W. P. CAMERON, R. P. BUTCHART, and CLARK M. MOORE.

Defendants.

**Assignment of Errors of Clark M. Moore,  
Defendant.**

Comes now Clark M. Moore, defendant in the above-entitled cause, and plaintiff in error upon the writ of error prosecuted by him in the above-entitled cause, and makes and files the following assignment of errors upon which he relies in the prosecution of said writ of error:

## I.

The District Court erred in overruling the demurrer of this defendant to the indictment found by the grand jury in the above-entitled cause.

## II.

The District Court erred in overruling the objection of this defendant to the introduction of any evidence in this cause upon the ground that the indictment does not state facts sufficient to charge a crime of any kind or any violation of the law, which objection was made in open court before any evidence was admitted in said cause.

## III.

The District Court erred in admitting in evidence a letter written by the agent of the Riverside Portland Cement Company to Tyler Henshaw from Portland, dated April 1, 1914, and in overruling the objection of this defendant to the admission of said letter and in permitting said letter to be [760] read to the jury. The said letter was marked Plaintiff's Exhibit 1, and in substance confirms a telegram advising new market price in Portland \$1.70 net, states said price quoted openly and apparently on instructions to California representatives from San Francisco, and further says that the Olympic and Washington representatives claim they had no instructions to make this price and would need such instructions if officially informed to do so; it also refers to quotations on the Meier & Frank job,

## IV.

The District Court erred in overruling the objec-

tion of this defendant to a letter written by Jones, agent for the Riverside Portland Cement Company in Portland, to Tyler Henshaw, dated April 7, 1914, and in admitting said letter in evidence and allowing same to be read to the jury. The substance of this letter refers to seeing Hacker, who stated that Seattle prices was \$1.60 f. o. b. docks, apparently the result of a fight between Washington mills; that there was no reduction in Portland probably for lack of business, and that Washington mills asserted that their Seattle price would apply to Portland, and that the writer expects a drop in the Portland Market; also, in overruling the objection of this defendant to a letter from said Henshaw to said Jones, dated April 11, 1914, and admitting said letter in evidence and to be read to the jury. Both of these said letters are marked Exhibit 2. The substance of said letter of April 11, 1914, is to acknowledge the information contained in the letter of April 7, 1914, as to a fight against Warren Construction Company. [761]

#### V.

The District Court erred in overruling the objection of this defendant to a letter written by William G. Henshaw to C. W. Jones, dated November 16, 1914, and in admitting said letter in evidence and to be read to the jury, the substance of which letter is that Riverside Portland Cement Company has decided to drop out of the Portland market, and directing the agent to make no further quotations, and to advise the amount of cement on hand and

the commitments outstanding. The said letter is marked Plaintiff's Exhibit No. 30.

#### VI.

The District Court erred in overruling the objection of this defendant to a letter written by C. W. Jones to Taylor Henshaw, dated December 5, 1914, and in admitting said letter in evidence and to be read to the jury, and in overruling the objection of this defendant to a telegram of the same date, and in admitting said telegram in evidence and to be read to the jury. The full substance of said letter is that Eden, Coats, and Cameron of Balfour Guthrie & Company left on the Shasta on that date from San Francisco, and that Jones would be in San Francisco on Thursday morning with data. This letter and telegram are marked Plaintiff's Exhibit 31.

#### VII.

The District Court erred in overruling the objection of this defendant to a letter written by Riverside Portland Cement Company to A. C. Steckle, of Battleground, Washington, dated March 18, 1915, and in admitting said letter in evidence and to be read to the jury. The full substance of this letter is acknowledging an order for cement and stating that the Riverside Company had withdrawn from the market and that rather than [762] delay shipment the order had been referred to Henry Cowell Cement & Lime Company. This letter is marked Plaintiff's Exhibit 32.

#### VIII.

The District Court erred in overruling the objec-



tion of this defendant to a letter from C. W. Jones to Tyler Henshaw, dated March 9, 1915, and in admitting said letter in evidence and to be read to the jury. The full substance of this letter is in regard to freight reduction on Interstate Bridge contract. This letter is marked Plaintiff's Exhibit 33.

### IX.

The District Court erred in overruling the objection of this defendant to a telegram from William Pierce Johnson to Tyler Henshaw, dated June 5, 1915, and in admitting said telegram in evidence and to be read to the jury, and in overruling the objection of this defendant to a letter from said Henshaw to said Johnson in answer to said telegram. Said telegram and letter are marked Plaintiff's Exhibit No. 34. The full substance of this telegram is that the sender has a price of \$1.95 less 1% f. o. b. Portland for 1300 barrels of cement, sacks extra, and asks Tyler Henshaw to assist him, and further states that he expects to require about 3,000 sacks for San Francisco delivery in the near future. The full substance of the day letter in answer thereto is that Henshaw is sending the Portland order to C. W. Jones personally, that the order could not go through the San Francisco purchasing order and that Riverside Portland cement could not be furnished but some other California brand, and that Jones could probably help out to the extent of about 20¢ per barrel. [763]

### X.

The District Court erred in overruling the objection of this defendant to a letter from the Bend

Company to Riverside Portland Cement Company, dated August 20, 1915, asking for quotations, and the answer from the Riverside Portland Cement Company to the Bend Company, dated August 25, 1915, stating that the Riverside Company is not in a position to quote as it had withdrawn from the cement market in this territory, and refers to the possibility of another cement company entering this market; and the said Court erred in permitting said letter and the answer thereto to be admitted in evidence and to be read to the jury. Said letter and answer thereto are marked Plaintiff's Exhibit 36.

### XI.

The District Court erred in overruling the objection of this defendant to a letter from Riverside Portland Cement Company to the Bend Company, dated August 23, 1915, to the effect that the Riverside Company never handled lime and plaster and had referred the inquiry of the Bend Company to J. McCracken Company, the exclusive agent for Roche Harbor lime, and in admitting said letter in evidence and to be read to the jury. This letter also states that there is a strong possibility of another cement company entering this field in the very near future. In connection with this letter there was a letter also introduced in evidence and read to the jury from the Bend Company to the Riverside Portland Cement Company, dated August 20, 1915, requesting quotations on cement, lime, plaster, etc. These letters are marked Plaintiff's Exhibit No. 37.

### XII.

The District Court erred in overruling the objec-

tion of this defendant to any evidence regarding the Interstate Bridge between Portland and Vancouver, and particularly the [764] evidence of the witness C. F. Swigert, in regard to buying cement from International Portland Cement Company for \$1.65 per barrel delivered at Portland on condition that the freight rate on such cement from Spokane to Portland should be  $13\frac{1}{2}\text{¢}$  a hundred, and all evidence of every kind in regard to cement furnished for said Interstate Bridge or in regard to negotiations between the witness Swigert and cement companies other than the Oregon Portland Cement Company for the purchase of said cement for said purpose; and in admitting any evidence in regard to said matters and in regard to the proposed freight rate on cement from Spokane to Portland. Said evidence is set forth in full in the bill of exceptions, and the substance of it is that the witness purchased the cement for this purpose from the International Portland Cement Company of Spokane at \$1.65 per barrel delivered in Portland; that he had quotations from other cement companies ranging from \$1.90 to \$1.75, that the price in Spokane at that time ran from \$1.08 to \$1.15, as there was a bitter fight between the International Portland Cement Company and the Lehigh Portland Cement Company; that the witness went to the Spokane, Portland & Seattle Railway Company's officials, and they agreed to put in this rate of  $13\frac{1}{2}\text{¢}$  per hundred from Spokane to Portland on cement; that he also lined up about 60,000 barrels of cement, all subject to this rate go-

ing into effect; he saw some of the Washington Portland Cement Company people, among others Mr. Coats, and that Coats said that if he would not insist upon Skinner, the agent of the Spokane Portland & Seattle Railway Company, putting in this rate, he would see that the witness was protected in price; that the cement supplied to him was almost entirely Superior cement, a Washington [765] product, or Santa Cruz cement, a California product, and that he paid for this cement \$1.65; that he never got any cement afterwards as cheap; that orders were placed with International Portland Cement Company, but the cement was furnished by the Superior Company or Santa Cruz Cement Company upon these orders, mostly Santa Cruz cement, and that subsequently the orders were placed directly with the Santa Cruz Company in Portland or with Mr. Bennett, agent of the Superior Company in Vancouver.

### XIII.

The District Court erred in overruling the objection of this defendant to a contract between the Superior Portland Cement Company and the Pacific Bridge Company, and in admitting said contract in evidence and to be read to the jury. Said contract is marked Plaintiff's Exhibit 38, and in substance is a contract between the Superior Portland Cement Company and the Pacific Bridge Company, whereby Superior Portland Cement Company agreed to furnish cement to the Pacific Bridge Company for building the sub-structure of the Interstate Bridge



between Portland and Vancouver at a price of \$1.65 a barrel.

XIV.

The District Court erred in overruling the objection of this defendant to a letter to the Treasury Department, dated February 2, 1915, marked Plaintiff's Exhibit 40, and in admitting said letter in evidence and to be read to the jury. Said letter is as follows:

"Treasury Department,  
Washington, D. C.

Gentlemen:

We the undersigned dealers in building [766] materials of this city wish to report to you the predicament we find ourselves in at the present time due to a combination made to control the sale of all cement here and also in the adjoining city of Hoquiam. This combination apparently being entered into by the following well known manufacturers of cement: The Superior Portland Cement Company, The Washington Portland Cement Company, and the Olympic Portland Cement Company of this state with head offices in Seattle; The Pacific Portland Cement Company of California with offices at San Francisco, and also the F. G. Foster Company of Hoquiam, Washington, the latter dealers in building materials.

Now this city has been supplied through the undersigned in the past with Washington and California manufactured cements. The T. B. Darragh Company selling the cement of the Pacific Portland Cement Company. The Aberdeen Manufacturing

Company selling the cement of the Henry Cowell Lime & Cement Company, and the W. R. Lebo Company selling the cements of all three of the mentioned Washington Companies.

The first of the year saw the following changes here due to this combination. Cement was raised 30¢ per barrel to the consumer, from \$1.90 to \$2.20 net. The agency held by the Lebo Company of the three Washington cements was taken away from them and given to the F. G. Foster Company who then opened up a branch business here with a stock of building materials. The Pacific Portland Cement Company notified the Darragh Company that they must quote cement no cheaper than \$2.30 net, or 10¢ above the Foster Company price, which naturally eliminated the Darragh Company from securing any cement business. The Henry Cowell Lime & Cement Company wrote the Aberdeen Manufacturing Company that they had withdrawn from the Washington market and that they would ship [767] no more cement to Aberdeen. Now this action was taken by the California companies the first of the year in spite of the fact that they could get business at a 30¢ per bbl. advance in price and a 50¢ per bbl. advance over what they received for cement here during most of the year 1914, the price then being \$1.70 net. Also, these same California companies are to-day shipping cement into Portland, Oregon, at a higher freight cost from San Francisco than the freight cost is to Aberdeen and receiving for this cement in Portland 30¢ per bbl.

less than they can get for it in Aberdeen, under the present prevailing market price.

This combination is going to work a great hardship upon us for the following reasons. We deal in all kinds of building materials and as most orders in a city the size of Aberdeen are mixed orders, consisting of cement, lime, brick, etc., etc., a buyer in nearly every instance wants his requirements from one place, and as cement is usually the chief item, this combination is going to stifle competition and give the Foster Company a leverage that must soon draw the bulk of the building material business to them, to the demoralization and perhaps ruin of our business.

Now this combination must certainly be illegal and we are therefore writing you and requesting that your Department investigate this matter and if possible get relief for us.

Yours very truly,

ABERDEEN MANUFACTURING COMPANY,

\_\_\_\_\_, Mgr.

W. R. LEBBO & COMPANY,

\_\_\_\_\_, Mgr.

T. H. DARRAGH COMPANY,

\_\_\_\_\_, Mgr." [768]

XV.

The District Court erred in overruling the objection of this defendant to the following question propounded to the witness by J. G. Bennett, a witness on behalf of the United States:

Question: "What did he say to you about it?"

and in permitting said question to be answered and admitting in evidence the answer of said witness. The substance of this testimony is that Mr. Lille, a salesman of the Superior Portland Cement Company, made a trip to Vancouver, Washington, and informed said witness that the fighting methods between cement manufacturers were done, and that there would be a new deal on, and gave the witness to understand that there was a meeting in San Francisco of Washington and California cement manufacturers about the beginning of 1915, and that there would be an adjustment of prices and prices would be much higher and that there would be no deviation from the prices, and advised witness to buy all he thought he could handle; he bought accordingly at about \$1.55, and shortly afterwards had a wire that the price would be \$1.90 with the usual dealers' commission.

## XVI.

The District Court erred in overruling the objection of this defendant to a letter written by the witness J. G. Bennett to J. C. Eden and the reply of J. C. Eden to the same upon the back of said letter, and in admitting said letter and answer in evidence and to be read to the jury. The said letter and answer are marked Plaintiff's Exhibit No. 41, and are as follows:



“Vancouver, Washington, April 30, 1915.

Mr. Jno. C. Eden,

Seattle, Washington.

Dear Sir: We wrote your firm asking about the situation [769] in regard to the bridge cement. We have answer saying the rate question had not been settled yet and ending as follows:

If, however, coast cement should be used, we would in all probability have to put it through our Portland representative, viz., Balfour-Guthrie & Co.

Signed—SUPERIOR PORTLAND CEMENT CO.

A. A. SUTHERLAND.

This does not worry us any as we have been told by both yourself and Mr. Barnes that if Superior cement is used it will be handled by us. However it looks to us as if your Mr. Sutherland was trying to loose your remaining Vancouver customer.

Very likely it is a California proposition by this time anyway, as the writer saw a schooner unloading cement at the Pacific Bridge Co. dock yesterday, but if there is anything doing for us we would like to know about it and not be kept in the dark.

Very truly yours,

BENNETT HDW. CO.

J. G. BENNETT.”

May 5, 1915.

My dear Bennett:

I have yours of the 30th in regard to cement for the Interstate Bridge. As you doubtless are aware, a contract was entered into between the

Pacific Bridge Co. and other Portland contractors with the International Portland Cement Co., of Spokane, covering their entire requirements.

While it is possible that some of these contracts may [770] be assigned to us, you I think will agree with me that inasmuch as you had nothing to do with the making of the contract between the Bridge Company and the International Company, you would not be entitled to any commission, particularly as we would doubtless have to pay the International something for making the assignment.

However, the fact is I am quite sure that the Bridge Company, if any assignment is made, will insist upon being given either Standard or Santa Cruz cements, as the manufacturers of those brands dock practically all of their cement in the dock of the Pacific Bridge Company in Portland.

Under the circumstances, don't you agree with me that we could not afford to pay two commissions on an order which your firm had nothing to do with placing?

---

President."

JCE\*T.

## XVII.

The District Court erred in overruling the objection of this defendant to a letter offered in evidence by the United States addressed by Bennett Hardware Company to the Superior Portland Cement Company and the answer on the back of it, and in admitting said letter and answer in evidence and to be read to the jury. The substance of this letter

was in regard to the Crown Willamette Paper Company desiring several thousand barrels of cement for work at Camas, Washington, and that it was probable they would buy California cement in Portland using steamers from Portland, and the answer on the back of the letter, which letter is dated April 19, 1916, was to the effect that though Camas was regarded [771] in the territory of the Superior Portland Cement Company, the relations between some of the officers of the Crown Willamette Paper Company and the California companies were so friendly that they could not meet the situation. Said letters are marked Plaintiff's Exhibit 44.

#### XVIII.

The District Court erred in overruling the objection of this defendant to a letter written by the Santa Cruz Portland Cement Company, dated July 9, 1914, and in admitting said letter in evidence and to be read to the jury. The substance of the letter is a confirmation of verbal reduction making the price \$1.90 including sacks, ex dock, price to apply from day to day, job contracts closed at \$2.10 ex dock, and for 1915 delivery to be \$2.30 ex dock. This letter is marked Plaintiff's Exhibit 47.

#### XIX.

The District Court erred in overruling the objection of this defendant to a letter written by the witness Hacker to Fred R. Muhs, dated April 10, 1914, and in admitting said letter in evidence and to be read to the jury. The witness was the agent or dealer of the Santa Cruz Portland Cement Company at Tacoma, Washington. The substance of

this letter was to advise the California mills to put some cement into Puget Sound markets in order to take part in the fight then being carried on between two Washington companies, and also suggesting that the Washington companies were threatening to drive the California companies out of the Oregon market. This letter is marked Plaintiff's Exhibit 50. [772]

## XX.

The District Court erred in overruling the objection of this defendant to a letter from the Olympic Portland Cement Company, signed Balfour-Guthrie, to F. T. Crowe & Company, dated July 17, 1914, quoting price of \$1.90 net less 15¢ commission, sacks extra, and in admitting this letter in evidence and to be read to the jury. This letter is marked Plaintiff's Exhibit No. 52.

## XXI.

The District Court erred in overruling the objection of this defendant to a letter written by the Superior Portland Cement Company to F. T. Crowe & Company, of Tacoma, quoting \$1.90 net f. o. b. Seattle, dated July 17, 1914, and in admitting said letter in evidence and to be read to the jury. This letter is marked Plaintiff's Exhibit No. 54.

## XXII.

The District Court erred in overruling the objection of this defendant to a letter written by the witness Hacker at Tacoma to Fred R. Muhs, of Seattle, dated July 23, 1914, and in admitting said letter in evidence and to be read to the jury. This letter acknowledges night letter received and states



that the witness is selling cement from day to day delivery at \$1.50 and upon future contracts at \$1.70, and is sending a copy of this letter to Portland. In this letter the witness adds that the people in Washington have seen some wisdom, and prices in Seattle, Portland, and Tacoma are \$1.90 firm, and that if the Washington mill would use policy which the witness had suggested to them these prices would stick. This letter is marked Plaintiff's Exhibit 55. [773]

### XXIII.

The District Court erred in overruling the objection of this defendant to a letter dated August 27, 1914, marked Plaintiff's Exhibit 56, and in admitting this letter in evidence and to be read to the jury. This letter was written by the Superior Portland Cement Company at Seattle to F. T. Crowe & Company at Tacoma, and in substance it refers to a telephone conversation and states that the Washington cement manufacturers had agreed among themselves that a certain order referred to in the letter should come to the Superior Portland Cement Company, stating that the Superior was putting in a bid of \$1.85½, and Balfour-Guthrie & Company at \$1.90, and requesting Crowe & Company not to bid at all on this contract, or if they did bid to bid slightly above the Superior Portland Cement Company.

### XXIV.

The District Court erred in overruling the objection of this defendant to a letter from Superior Portland Cement Company, dated Seattle, Decem-

ber 31, 1914, to Crowe & Company, of the same place, quoting price on cement effective January 1st \$1.90 net, no commission, and a second letter bearing the same date from Olympic Portland Cement Company to the same party to the same effect, and a further letter from the Olympic Portland Cement Company to the same party, dated Seattle, January 4, 1915, acknowledging the letter of Crowe & Company, dated January 2, 1915, and stating that program properly outlined and Olympic would sell in carload lots at \$1.90 to any consumer, leaving less than carload lots to dealers, and also a copy of the letter from Crowe & Company to the Olympic dated January 2, and also a letter from the Superior Portland Cement Company dated Seattle, January 12, 1915, to Crowe & Company, at Tacoma, requesting Crowe & Company to confine their sales to Tacoma and that the [774] Cement Company would appoint other agents at points outside of Tacoma, and that both other factories were adopting the same policy; and also a letter from the Superior Portland Cement Company, dated Seattle, February 23, 1915, to said Crowe & Company relating to the terms upon which its cement would be sold; and to admitting in evidence said letters and each of said letters and permitting the same and each of them to be read to the jury. Said letters form one exhibit marked Plaintiff's Exhibit No. 57.

## XXV.

The District Court erred in overruling the objection of this defendant to certain letters offered

in evidence and to admitting said letters in evidence and to be read to the jury, which letters were offered as one exhibit and are as follows: Letter from the Superior Portland Cement Company, dated Seattle, January 13, 1916, to Crowe & Company, Tacoma, quotes price \$2.15 including sacks f. o. b. Tacoma, allowance  $7\frac{1}{2}\phi$  per sack; also letter from Superior Portland Cement Company, dated Seattle, January 13, 1916, to Crowe & Company, Seattle, quote \$2.30 f. o. b. Seattle, including sacks, sack allowance  $7\frac{1}{2}\phi$ ; and also a letter from Washington Portland Cement Company, dated Seattle, January 12, 1916, to Crowe & Company, Seattle, quotes price effective same date \$2.30 f. o. b. Seattle, including sacks, sack allowance  $7\frac{1}{2}\phi$ ; also letter Olympic Portland Cement Company, dated Seattle, January 11, 1916, to Crowe & Company, Seattle, quotes price \$2.30 f. o. b. Seattle, including sacks, sack allowance  $7\frac{1}{2}\phi$ . Said letters offered as one exhibit marked Plaintiff's Exhibit No. 58. [775]

## XXVI.

The District Court erred in overruling the objection of this defendant to a question propounded to the witness Hacker as follows:

“Why did the Standard and Santa Cruz Companies leave the State of Washington?”  
and in permitting said question to be propounded and to be answered, and the answer to be submitted to the jury. This testimony was to the effect that before the Washington cement companies were started Washington and Oregon were dumping grounds for California companies; the California

companies selling into Montana and Idaho up to the point where they met eastern competition. When the Washington cement mills started, the California mills were restricted in territory where the Washington mills could supply cement cheaper by reason of freight rates. At that time the California companies were selling in eastern Washington as far as Spokane, freight rates being such that the Washington companies could not sell in eastern Washington. Afterwards eastern Washington mills were started and they crowded the California mills out of that territory, but Portland was the last place to which the California mills could ship as a dumping ground, and for this reason it was impossible to maintain prices because of conflict between the dealers; that the dealers were urging cement companies to get together and maintain prices; and as the California mills continued to sell in Washington there was a fight between all the mills.

## XXVII.

The District Court erred in overruling the objection of this defendant to certain letters marked Plaintiff's Exhibit [776] 63 received by Galbraith Bacon & Company, of Seattle, from Superior Portland Cement Company, of Seattle, Washington Portland Cement Company, of Seattle, Olympic Portland Cement Company, of Seattle, all dated February 10, 1914, and giving the same price and commission to dealers; and in admitting said letters in evidence and to be read to the jury.



## XXVIII.

The District Court erred in overruling the objection of this defendant to a letter identified by the witness Eden dated April 18, written by J. C. Eden to W. H. George, and a letter dated April 24 attached to the same, both offered in evidence together and marked Plaintiff's Exhibit 74, and the admission of said letters in evidence and the reading thereof to the jury. Said letters are as follows:

April 18, 1916.

"Dear Will:

Was mighty sorry on my visit to San Francisco last week not to have had time to have a few minutes talk with you, not only to speak about the Association, but to thank you personally for the wonderful party you gave us in San Francisco when I was there about two months ago.

Regarding the Association matters, I think your objection to any contribution in excess of  $\frac{1}{4}\text{¢}$  per barrel was the same as my own, viz., that too much of the  $\frac{3}{4}\text{¢}$  voted at the Association meeting in New York last December was to be divided to national advertising and to other uses that were of very doubtful value in our particular section of the country. I sincerely hope that you will be in accord with what all of those present at the meeting with Mr. Beck in San Francisco last week agreed to do. So far as the northwest is concerned, I am positive that the spending of [777] 80% of the  $\frac{3}{4}\text{¢}$  per barrel contribution will be a very good in-

vestment, and will enable us to reduce a good share of the direct expense we have been put to in each individual company attempting its promotion work.

I don't know whether you formed as favorable an impression of Mr. Beck as I did, but he certainly strikes me as being the right man in the right place, and I hope that you will join the rest of us in lending him your heartiest co-operation.

With kindest regards, and hoping that I may see you again in a short time, I am,

Yours truly,

Mr. W. H. George, 2 Market street,  
San Francisco, California."

"U. P. Co.	1916 May 15 A. M. 7:20	Received
President's Office	Ret'd .....	Portland Cement
1916, May 15 A. M. 8:32	Answ'd .....	Association
Ref'd to .....		May 15, 1916.
Answ'd .....		Noted BFA

HENRY COWELL LIME AND CEMENT CO.

2 Market street,

San Francisco, April 24, 1916.

Attention Mr. J. C. Eden.

Superior Portland Cement Company,  
Seattle, Washington.

My dear Jack: Replying to yours of April 18, beg to advise that on April 20 I wired Mr. Beck as follows:

'We will stay with the Association under new plan until October 1, the date when the year that we joined for is up. We will then consider the matter again. Am afraid local competitors will not stop private promotion.'

At first I was not sure about Beck, but the more I [778] saw of him the more I liked him and am willing to play the string out for the term of our enlistment of one year from October 1, 1915, to October 1, 1916.

Altogether I am free to confess that I am not quite sure as to the advisability of all this. I feel as tho a company like our own could probably to better advantage as far as its own interests were concerned do its own promotion work, but I do realize that this looks like a selfish position, because if the others were all in the Association, promoting the Association work, we, of course, get some measure of benefit. This, at this time, is the real reason that keeps our company in the Association, with the further hope that during the balance of the time that we are in, that things will develop so that all hands will see the advisability of a Coast Association, as I thoroughly believe in this.

I hope before long to have an opportunity to discuss all of this personally with you.

Yours very truly,

W. H. GEORGE,  
Secretary."

WHG-w.

## XXIX.

The District Court erred in overruling the objection of this defendant to the introduction of certain papers identified by the witness Eden, marked Plaintiff's Exhibit 75, and to admitting said papers in evidence and to be read to the jury. These papers consist of telegrams passing between F. R.

Muhs and J. C. Eden, of Kenny & Eden, between said Eden and one Coats, the president of the Washington Portland Cement Company, and between J. G. Woodworth, Vice-president of the Northern Pacific Railroad Company, and said Eden; all of these papers [779] related to the proposed freight rates upon cement from the International Portland Cement Company to the City of Portland to enable said cement company to deliver its cement to Portland and fulfill the contract of the Pacific Bridge Company, and show the effort made by the Washington companies and representatives of the Superior, the Washington, and Olympic Cement Companies to prevent this rate being put in; and this defendant avers that the court erred in admitting said papers or any of them in evidence and in admitting the same or any of them to be read to the jury.

### XXX.

The District Court erred in overruling the objection of this defendant to certain papers identified by the witness Eden and marked Plaintiff's Exhibit 76, and to admitting the said papers in evidence and to be read to the jury. Said papers consist of certain correspondence passing between Aman Moore and J. C. Eden, dated March 25, 1916, and relate to the manner of supervising paving work and contain the statement of Eden to the effect that inasmuch as his company would probably not participate in the cement business in Oregon, they could not see their way clear to assume any of the expense of promotion in Oregon.



## XXXI.

The District Court erred in overruling the objection of this defendant to certain letters identified by the witness W. P. Cameron, to wit, a letter dated August 4, 1916, marked Plaintiff's Exhibit 78, and certain other papers offered therewith identified by said witness, marked Plaintiff's Exhibit 79, and in admitting said papers and letters in evidence and to be read to the jury. These letters consist of correspondence [780] passing between Foster & Company, of Hoquiam, and the Washington Portland Cement Company, Olympic Portland Cement Company and the Superior Portland Cement Company, of Seattle, dated in August and September, 1916. The substance of these letters was that Foster & Company were acting as dealers and distributors of the cement of all three Washington companies in Hoquiam and that vicinity, giving each of said companies a fair share of the tonnage and putting all three companies upon the same footing.

## XXXII.

The District Court erred in overruling the objection of this defendant to a carbon copy of letter written by Tyler Henshaw to R. P. Butchart, marked Plaintiff's Exhibit 89, and in admitting said letter in evidence and to be read to the jury. Said letter is as follows:

September 24, 1914.

"Mr. R. P. Butchart,

Care Vancouver Portland Cement Company,  
Victoria, B. C.

My dear Mr. Butchart: I have been trying very

hard to find an opportunity to run up to Victoria to see you for a day, but have found it utterly impossible this time. I wanted to talk to you about two things—both are of a very intimate nature, but on account of the very warm feeling that I have for you, and which I trust is to some extent reciprocated, I would not hesitate to talk or write you, but, of course, I would much prefer to talk to you.

The first is in regard to Carl Leonardt. He is a very peculiar man. He has, off and on, been trying to start a cement plant somewhere in Southern California. Why, I don't understand for he certainly knows the conditions as well as any man. Southern California is as much over-produced [781] as any other section of the coast. After many abortive efforts to find a property, he finally located one apparently and seemed to have started in seriously to interest capital in it. This property is located out on Cajon Pass on the Santa Fe Railroad. It is not particularly well located, being four or five miles from the railroad, in a desert section of the mountains, where it will be inevitably hard to keep men at work. He cannot produce his cement ever anywhere nearly as cheap as we are producing it, although we will concede him just as good a quality. Now he is attempting to go into an already overloaded market. I don't understand some people in this way, however, I want to make my story as short as possible.

He came to San Francisco about two months ago and called in to see me. I asked him if he intended to put up a plant on his property, and he said, yes.

Then I went over the matter very friendly, kindly way with him; told him what the situation was; how terribly over-burdened that section was with cement; how the mills already there would have to wait ten or fifteen years until the demand grew up to the present output. All of which seemed to make little impression, but finally I said to him,—Now, see here, Mr. Leonardt, we have been very loyal friends of yours; have given you your cement under the market right along; we have protected you in your business, and being a cement man, as you are, you are doing this with your eyes wide open, therefore, it is only fair for me to say to you this,—that we will not stand patiently by and see you put up another mill and add more trouble to our market. You have an indubitable right to put up a mill, but we have just as indubitable a right to protect our market, and the moment you put your cement on the [782] market we propose to put the price down where neither you nor ourselves can make any money, and we will continue it there.

Now, Mr. Butchart, I don't bluff. The situation there is so bad now with Colton and ourselves and the little Gordon state mill, that if Leonardt comes in with a mill, we might just as well start in and clean up the situation one time as another and let the man with the longest pole take the persimmon.

Loenardt thought this over and finally intimated that he thought I was about right in my attitude, and told me if I would come down in the course of five or six weeks we would go down to the property and sell it out to me. No price was agreed upon,

but he stated positively he would do so. I went down south, telephoned him, and he came over to Riverside. We took a machine and went out there, and after looking over the property I told him I was ready to buy it and to name his price and terms. He then began to shy and finally told me he would be up to San Francisco in about two weeks and would then settle the matter with me, which could only mean he would sell to me. I tried to urge him to close up then, but he would not do so, but he again promised that within two weeks he would be up and sell it to me, I even said to him,— You mean you will sell this property outright to me, and he said, Yes.

Now, he is keeping out of my way. There is no question in my mind that he is going to try to interest capital. I don't think anybody would be foolish enough, under the circumstances, to go into the proposition with him. Freights are against him and he can't manufacture as cheaply as we can. My honest belief is that we can make \$300,000.00 a year and keep him out of the market, or make him sell below cost. I may be wrong, but I firmly believe it and propose to tackle [783] it anyway if he bobs up.

Now, without betraying any confidence as far as Mr. Leonardt is concerned, can you tell me whether he said anything to you about his plans down here. If so, what they were and whether you inferred he was seriously contemplating putting up a mill. I know you will tell me whatever you can properly, and I don't ask of you anything that is not proper



for you to tell me, but whatever you do tell me will not go under any circumstances beyond my brother and myself.

Now, secondly: This must be considered by you as strictly confidential, but I am writing you personally so that you will have a full knowledge of the situation here in Oregon, and I am writing you only from that standpoint and because of my warm personal friendship.

I have bought a property here which I have been testing for something like a year. It is a property which, in combination with our clinker, makes a cement of a remarkably high type. In fact, Mr. Butchart, in many ways exceeds regular Portland cement. This property will enable me to put a cement on the market here at a cost of from 65¢ to 75¢ a barrel, not exceeding the latter price, and I think we can do it, after a year's run, under the former price. Mind you, I am only talking of prospects. We are testing the material carefully in all directions, putting it into walls; putting it into high-ways; testing it under most unfavorable conditions, and so far it has shown up wonderfully. I am perfectly candid, and always with you my cards are never anything but 'face up on the table.' I am not quite through with my experiments with this cement, but will have finished them within the next three or four months, and will have it in practical use unknown to anyone except a few engineers. [784] Within the next three or four months, I will have had over a year's full test upon the material, all compression and tension tests, etc., and

will be in position to know exactly what the material is. I shall put it on the market in Portland at not over, I think, \$1.25 a barrel, and some of it for mass work, harbor work, street work and the like, will be sold for probably \$1.00 to \$1.10 in this market.

Now, I have heard nothing further for many, many months about the prospects of this Portland Cement Company here. I have understood you are not interested in this company here any further, although my information, naturally, was not authentic, but anyway I want you to know privately and confidentially what my prospects are here so that at least if you were contemplating any movement in regard to this cement plant, you would have full knowledge for your own personal benefit of what my prospects were. The whole plant that I will put up will not cost over \$100,000.00, and my estimates already made and carefully checked do not exceed \$75,000 for a plant to produce safely 400,000 barrels per annum. I will say this further, that I do not expect to put on the market over 200,000 to 300,000 barrels per annum anyway, but *if* this cement turns out as every test shows it to, covering a period of eight months or more, and *if* I can produce it with as little original investment, and *if* this little affair starts in without a dollar of indebtedness of any sort, and *if* I can produce it at the price I have stated or lower, it would be a serious competitor for any cement mill to face.

If there is anything further you would particularly like to know about it, write me any question

and I will be glad to answer you fully. [785]

Regretting exceedingly that I did not find the time to run up and discuss these matters with you, and with warmest personal regards, I beg to remain

Yours very sincerely,

P. S.—In reading this letter over, while I have written it only from the friendliest motives, I fear it may sound to you in the nature of a possible menace. I hope you know me well enough to believe that nothing of the kind is intended. The reason that I am writing is feeling that as I have a warm personal friendship for you, it seemed only justice to that friendship to tell you confidentially the prospects that were before me in this market in the cement line. I can see no reason why there should not be room for us both and, as indicated, I do not intend to come in here and try to supply the entire market. In fact, I know perfectly well that it would be impossible for me to do so, but at the same time I hope you understand that I am only telling you of these prospects (of course they are as yet only prospects) that might to some extent militate against any program you had set out in this market, if you are still connected with the Portland Cement Company here. You know that you and I could work side by side in this market without any trouble. I feared you might, if I said nothing about this beforehand, feel that I had failed in the matter of friendship to you in not letting you know confidentially and beforehand.”

## XXXIII.

The District Court erred in sustaining the objection of the United States to a certain letter identified by the [786] *by the* witness Aman Moore, written by Wirt Minor to Aman Moore, dated July 25, 1916, which letter is as follows:

July 25, 1916.

“Mr. Aman Moore,

Care Mr. Coy Burnett, Lewis Building,  
Portland, Oregon.

Dear Sir: I am in receipt of communication dated July 24th addressed to the Directors of Oregon Portland Cement Company and signed by yourself, in which you demand that an immediate directors' meeting be called for the purpose of obtaining various data from the parties named; that is to say, Mr. R. P. Butchart, Mr. Newlands, Mr. Macdonald, Mr. Clark M. Moore, and Mr. Ballard, to the end that suit may be instituted under the Federal 'Treble Damage Statutes' for the damage sustained by the company through alleged illegal agreement on the part of the gentlemen above named. This matter was brought before the Board informally at its last meeting and you were requested by myself to state what action you desired to take, but for some reason you did not see fit to do anything whatever.

The by-laws of the corporation, Article IV, section 4, provide that

‘Special meetings of the board of directors shall be called by the Secretary when he is re-



requested so to do by the President, on three days' notice to each director."

Special meetings shall be called in like manner on request of a majority of the members of the board. You are aware that the president of the corporation is now absent. You yourself are one of its vice-presidents. Section 2 of Article VI of the by-laws provides that

'In the event of the absence of the president, one of the vice-presidents shall exercise the powers and perform the duties of the president [787] during such absence, subject to the advice and control of the board or of the executive committee.'

You, therefore, have it in your power to call this meeting and I shall be pleased to have you do so. If you are not willing to take the responsibility of calling the meeting I am perfectly willing to be one of the majority of the board to call such meeting. It will require this call to be signed by five of the directors. Mr. Butchart is away; Mr. Bates has tendered his resignation, and it has not been accepted as yet at your instance; Mr. Wilson has tendered his resignation, but the same has not yet been accepted; and Mr. Johnson is away. It will, therefore, be necessary for you to be one of the five directors to join in the call.

If you desire to have the meeting called as suggested and will come to my office I shall take the pleasure in preparing the call and in signing it. I do not know, however, whether Mr. Butchart and Mr. Newlands, who are charged by you with mal-

feasance in office, will consent to sign such call or not; if not, you will have to procure the signatures of Messrs. Wilson and Bates.

As Mr. Butchart and other directors are charged with malfeasance in office, I think it will be but reasonable that the meeting when called shall be called for such time as to give these parties an opportunity to attend and respond in person.

Yours very truly,

WIRT MINOR."

WM/R.

#### XXXIV.

The District Court erred in sustaining the objection of the United States to the introduction in evidence of the [788] letter offered by the defendants written by Wirt Minor to Aman Moore, dated August 29, 1916, and in refusing the said letter to be identified or introduced in evidence. This letter is as follows:

August 29, 1916.

"Mr. Aman Moore,

Oswego, Oregon.

Dear Sir: As one of the directors of the Oregon Portland Cement Company and as one of its general attorneys of counsel, I hereby demand that you afford me an opportunity to investigate the facts upon which the suit brought by you in the name of the Oregon Portland Cement Company is based. In connection with this demand I also demand that you afford me an opportunity to examine all the evidence from which these facts have been deduced or inferred.

I also desire you to advise me by what authority this action was commenced for, as you are aware, it was commenced without consulting the Board of Directors. I should be pleased to confer with your attorneys at any time regarding the matter and to examine the evidence in their office and to this end I am sending a copy of this letter to each of your attorneys of record.

I will add that I have been requested to take this step by several of the directors of the corporation.

Yours truly,

WIRT MINOR."

WM/MH.

XXXV.

The District Court erred in overruling the objection of this defendant to certain correspondence passing between [789] Carl Leonardt and the witness W. H. George, consisting of a letter from George to Leonardt, dated February 1, 1916, and the answer thereto, dated February 7, 1916, and the reply to said answer, dated February 8, 1916, all of which were offered as one exhibit and marked Plaintiff's Exhibit 105; and to the admission of said letters and each of them in evidence and to the reading of said letters and each of them to the jury. These letters are as follows:

(In pencil)

"L. B. 10/13/20.

HENRY COWELL LIME AND CEMENT CO.

2 Market Street.

San Francisco, February 1, 1916.

Mr. Carl Leonardt,

Care Southwestern Portland Cement Company,  
H. W. Hellman Building, Los Angeles.

My dear Mr. Leonardt:

I arrived home safely and want to thank you for your very kind and courteous treatment when I was at Los Angeles. Please remember me kindly to Mr. Merrill and to Mr. Schirm.

I hope that by this time the get-together talk which I made it my particular business to give to all of those who are in the lime business is bearing fruit and that the conditions are better and settled.

I congratulate you on the layout and character of your cement plant and trust that when she begins operation you will find a ready market for a reasonable output, at the highest price, and under regular terms and conditions. [790]

Regarding regular terms and conditions, I enclose you herewith a little suggestion which I trust will be interesting. We have found it to work out to the best possible advantage here.

I hope to be able to write you in a few days that the allowance for returned empty sacks has been changed to 7½ cents.



Again thanking you, and conveying to you my best personal regards, I remain

Yours very truly,

W. H. GEORGE."

WHG-W.

"Monday, February 7, 1916.

(In pencil)

L. B. 10/13/20.

Mr. W. E. George, Secretary,

Henry Cowell Lime & Cement Company,

2 Market Street, San Francisco, California.

My dear George:

I received your letter of February first and thank you very much for the contents. That is the proper spirit! I refer to where you mention regarding our new cement plant that you 'trust when it begins operation we will find a ready market for a reasonable output,' etc.

Some of our cement manufacturers seem to think that no one else has a right to engage in the same business and manufacture and sell cement, which is entirely wrong as this is a free country and every man has a right to make an honest living, and any combine to ruin a competitor by misrepresentation and crookedness is wrong, which soon or late they will find out to their sorrow if they do not change their tactics.

You know a good neighbor cannot live in peace if the bad neighbor does not want him to. The Portland plant [791] as well as the Victorville plant wants to live in peace, but no man has a right to say that these plants have no right to manufacture

or sell cement. These plants only want their rights which they hope to obtain by peaceful and harmonious methods. Of course you know what it means to a large manufacturer as compared with one that has less capacity, when it comes to price cutting. I leave it to you to say who can stand it the longest.

I was in San Francisco last Saturday, leaving the same evening. I talked with your office, but you were at the factory. Mr. Butchart was with me and no doubt will write you from Del Monte. You can see him at any time and go into details with him, and should something of importance come up I will be willing to go to San Francisco at any time,

Wishing you success, I am,

Yours very truly,

---

President."

"HENRY COWELL LIME & CEMENT CO.

2 Market Street.

San Francisco, February 8, 1916.

(In pencil)

L. B. 10/13/20.

Carl Leonardt, Esq.,

President, Southwestern Portland Cement Company,

710 H. W. Hellman Bldg., Los Angeles.

Dear Mr. Leonardt:

I am just in receipt of yours of February 7th, and hasten to reply.

I am willing to admit the truth of every word that [792] you say and you know how I feel

about these matters. I feel that that is exactly the way they should be carried out.

Undoubtedly by this time you have my other letter written from the plant on last Saturday.

At this writing I am at a loss to know where Mr. Butchart is. My understanding was that he was going to Los Angeles, probably with you from San Francisco, altho my first impression was that he was going direct to Los Angeles. I have written him in your care at Los Angeles and am now awaiting results as to whether it is best for me to go to Los Angeles, to see him at Del Monte when he goes there, or to await his arrival again at San Francisco.

When in Los Angeles I outlined to you what I wanted to say to Mr. Butchart, and I do hope that it will be agreeable and work to a satisfactory end. I shall be very glad indeed to advise you of all results.

Thanking you indeed for your many courtesies, I remain

Yours very truly,

W. H. GEORGE, Secretary."

WHG-W.

XXXVI.

The District Court erred in overruling the objection of this defendant to questions addressed to the witness W. D. Skinner, Traffic Manager of the Spokane, Portland & Seattle Railway, in regard to putting in a special rate on cement from Spokane to Portland in 1915 in order to get the haul of the

cement for the Interstate Bridge, and to admitting said evidence or any thereof. [793]

### XXXVII.

The District Court erred in overruling the objection of this defendant to the introduction in evidence of a certain paper marked Plaintiff's Exhibit 151, and to admitting said paper in evidence and to be read to the jury. The said paper is as follows:

"S. P. & S. will publish rate 13½ cents on cement c/1 from Irwin, Washington, to Vancouver, Washington, and Portland, Oregon, if Irwin plant secures contract *secures contract* for interstate bridge cement. W. D. Skinner, F. T. M. Portland, Oregon, 3/6/15."

### XXXVIII.

The District Court erred in overruling the objection of this defendant to a certain paper offered in evidence by the United States marked Plaintiff's Exhibit 152, and to admitting said paper in evidence and to be read to the jury. This paper is a letter from the International Portland Cement Company to W. D. Skinner, in which they state:

"Have not secured contract, please publish rate with least possible delay."

### XXXIX.

The District Court erred in overruling the objection of this defendant to certain papers identified by the witness W. D. Skinner, marked Plaintiff's Exhibit 153, and in admitting said paper in evidence and to be read to the jury. Said papers were offered as one paper, and they consist of telegram



dated March 11, 1915, from the International Portland Cement Company to said Skinner, as follows:  
[794]

“Did not receive copy of traffic, must have effected earliest date.”

and the reply of said Skinner thereto as follows:

“Hands tied temporarily, will advise definitely few days.”

#### XL.

The District Court erred in sustaining the objection of the United States to a question propounded to the witness F. R. Muhs as follows:

Question: “Now, give the jury some idea of how profitable it has been, say how much money in proportion to the capital your mills have made?”

The witness had testified that the companies with which he was identified, the Santa Cruz Portland Cement Company and the Standard Portland Cement Company, after 1908 had made money, and the evidence sought to be elicited was for the purpose of showing that the amount of money made had been small as compared with the capital invested.

#### XLI.

The District Court erred in sustaining the objection of the United States to a question propounded to the witness F. R. Muhs, in which he was requested to tell the jury whether in his judgment, taking into consideration the cost of manufacturing and the freight which was paid on cement, the price

charged by his mills was or was not a reasonable price.

#### XLII.

The District Court erred in sustaining the objection of the United States to testimony by the defendants through the witness L. C. Newlands as to the reasonable cost [795] of putting up the mill of the Oregon Portland Cement Company in 1915 and 1916, which evidence was offered for the purpose of showing the cost of manufactured product, the defendants claiming that the cost or value of the factory is a proper element to take into consideration in ascertaining the cost of the manufactured product.

#### XLIII.

The District Court erred in the ruling of the Court excluding evidence offered by the defendants through the witness Ballard, that after he had made investigation into the affairs of the Oregon Portland Cement Company as vice-president and acting president of said corporation and had interviewed all the parties who were conducting the business of said corporation in order to ascertain whether or not the Oregon Portland Cement Company or its officers were violating the provisions of the law under which the indictment was found, that he found no evidence to sustain a charge of violation of this law, and in refusing to admit evidence to this effect.

#### XLIV.

The District Court erred in sustaining the objection of the United States to the following question

propounded to the witness Ballard by the attorneys for the defendants:

Question: "What did you do, Mr. Ballard, in order to ascertain the prices at which the Oregon Portland Cement Company's products were being sold?"

and erred in refusing said question to be answered and in refusing to allow the defendants to show by this witness the prices at which the Oregon Portland Cement Company's products were sold. [796]

XLV.

The District Court erred in sustaining the objection of the United States to the following question propounded to the witness Ballard:

Question: "And what, if anything, did he say to you with regard to prices at which the products of the mill were to be sold?"

and in refusing to permit the defendants to show what Clark Moore told Mr. Ballard, vice-president and acting president of the corporation, in regard to prices at which the products of the mill were sold. The testimony which was offered was for the purpose of showing that Clark Moore said nothing in regard to prices at which products of the mill were to be sold.

XLVI.

The District Court erred in overruling the objection of this defendant to the following question propounded to the witness H. S. McCracken:

Question: "At what price did you sell cement at that time?"

and erred in allowing said question to be answered.

The witness McCracken was a dealer in cement in the city of Portland; he had testified in regard to prices which he paid for cement to the Oregon Portland Cement Company and other cement manufacturers; and the testimony admitted was to the effect that he sold cement at \$2.30 because he could get no more for his cement than other companies could get, that the California companies were selling cement in Portland through their own selling agencies, and were selling to the public at \$2.30.

### XLVII.

The District Court erred in sustaining the objection of the United States to the admission in evidence of a certain telegram [797] offered by the defendants addressed to R. P. Butchart and signed by Charles Boettcher, E. Prossett, and R. J. Morse, dated July 27, 1916. This telegram had been identified by the witness Wirt Minor as a telegram shown to him or read to him by Aman Moore at a meeting held in his office between Aman Moore, Clark M. Moore, representing Mr. Boettcher, and Harry Ross, representing Mr. Butchart. This telegram is as follows:

July 27, 1916.

“Mr. R. P. Butchart,

Vanderbilt Hotel, New York City.

We have inspected your plant here and have no criticism to make of Mr. Newlands management but on account of notoriety of lawsuit and damage to company would recommend Aman Moore be placed in charge of plant and quarries leaving sales as at present and that you wire Mr. Newlands



to resign and permit the election of some new member to Board of Directors. We have talked to a number of stockholders here and they are unanimous that settlement should be made with Moore to prevent notoriety and damage of his suit. Bank also refused to extend loan unless assured suit will not be brought. We have looked over figures in office and find we must have at once fifty thousand dollars more to meet pay rolls and bills. Wilcox will loan part if board is reorganized. If change meets with your approval will you kindly wire Teal and Minor attorneys and stockholders to call meeting and reorganize board and appoint Moore superintendent.

C. BOETTCHER.

R. J. MORSE.

E. POSSETT."

and erred in excluding said testimony. [798]

### XLVIII.

The District Court erred in sustaining the objection of the United States to the admission in evidence of a telegram from the witness Clark M. Moore to Grant Fee and of a letter from Grant Fee to the witness. These papers were marked defendants' identifications 112 and 113 respectively, and were excluded by the ruling of the court. In substance they relate to the proposed visit of Clark M. Moore to San Francisco in August, 1916, and to a meeting which he wished to have with Grant Fee at that time with a view to selling him Oregon Portland cement for the erection of the Portland postoffice. The witness had testified in regard to

the purpose for which he had gone to California, and among other things he went there to see Mr. Fee to sell him if possible the cement for the Portland postoffice, for which said Fee had obtained a contract.

#### XLIX.

The District Court erred in sustaining the objection of the United States to certain telegrams offered in evidence by the defendants, marked defendants' identifications 114 and 115, and to the exclusion of said telegrams from the evidence by the ruling of the court. The witness Clark M. Moore had testified regarding a visit he made in August, 1916, to San Francisco, and among other objects of that visit was to see a Mr. Hiltz who was a representative of the Portland Cement Association on the Pacific coast with a view to having him come to Portland and arrange for an inspector on some road work which was being done to see that the work should be done according to specifications, and in connection therewith the defendants offered in evidence certain telegrams, as aforesaid, for the purpose of showing this to be, among [799] other things, his object in going to San Francisco.

#### L.

The District Court erred in overruling the objection of the defendant to excerpts from a letter written by the witness Clark M. Moore to Mr. Boettcher, dated May 18, 1916. This letter was written by Mr. Clarke M. Moore to Mr. Boettcher after a meeting of the Portland Cement Associa-

tion in Chicago, dated May 18, 1916, and said excerpts and letter are marked Plaintiff's Exhibit 163.

## LI.

The District Court erred in that part of its charge to the jury as follows:

"It (the indictment) contains two counts; the first charges certain parties, managers, or representatives of cement manufacturing concerns in the states of Oregon, Washington, and California with entering into an unlawful combination or agreement in restraint of trade. . . . The second count charges the same parties by means of the same arrangement and combination, with monopolizing the trade in cement in these several states."

## LII.

The District Court erred in that part of its charge to the jury as follows:

"Section II of the Act provides that every person who shall monopolize any part of the trade or commerce among the several states or with foreign nations, shall be guilty of a misdemeanor."

## LIII.

The District Court erred in that portion of its charge to the jury as follows: [800]

"Now the second count of the indictment, as I have already said to you, charges the defendants with monopolizing the trade or commerce between the states, in violation of Section two of the Act, which provides that all

persons who shall monopolize or attempt to monopolize or combine with any person or persons to monopolize any part of the or commerce among the several states, shall be guilty of a crime. To constitute the offense of monopoly, under the Act, it is necessary to acquire exclusive right to such commerce by means which prevent others from engaging therein. The popular meaning of monopoly is the sole power of dealing in some particular commodity, in some particular market or place, or carrying on some particular business. Anything less than this is not a monopoly. The size of a business is not in itself a violation of this law. The act denounced by the statute is the certain and necessary prevention of other persons engaging in such business and thereby stifling or preventing competition. The evil against which the statute is directed is not the enlargement of the trade of one person, but the destruction of the trade of others, in some commodity. It is the suppression of competition by the unification of interest or management, or by agreement or concerted action. It signifies the combining or bringing together into the hands of one person, or group of persons, the control, or the power of control over a particular business or employment, so that competition may be suppressed by preventing others from engaging therein."

#### LIV.

The District Court erred in that part of its



charge to the jury relating to the Portland Cement Company prior to [801] the organization of the Oregon Portland Cement Company, and particularly to that portion as follows:

“There have been introduced in evidence some letters passing between Mr. Butchart and Mr. Aman Moore at a time prior to the date the Oregon corporation began marketing its products, and prior to the time that Clark Moore became connected with the concern.”

. . . . “They are, however, evidence against Mr. Butchart, and may be considered by you for the purpose of showing the conditions as they existed at the time Clark Moore became sales manager for the Oregon Company.”

LV.

The District Court erred in that portion of its charge to the jury as follows:

“Certain letters have also been introduced in evidence, written by Aman Moore and addressed to Mr. Butchart, which contain statements or suggestions concerning fixing prices or allotment of territory, by agreement with other manufacturers. The statements or suggestions contained in these letters are not evidence against Mr. Butchart, and do not tend to prove the connection of Butchart with any such agreement or combination, unless it appears that he acquiesced in the suggestion, or acted thereon, or combined with other manufacturers in accordance with the statements or suggestions so made by Moore.

Various letters have also been introduced written by officials, or associates of officials. of cement manufacturers in Washington and California, to defendants Clark Moore and Butchart. Any statements, suggestions, or requests [802] contained in any such letters are not to be taken or deemed as evidence of the guilt or innocence of the defendants Moore or Butchart, unless Butchart or Moore acquiesced in such statement and acted thereon, or combined with other cement manufacturers in accordance with the statements or suggestions made or contained in the letters, but these letters are part of the evidence, showing the relation existing between these people, and their conduct and actions, and for that purpose are competent and should be given such weight as you gentlemen may think they are entitled to,"

and the District Court erred particularly in that portion of the charge as follows:

" . . . but these letters are a part of the evidence, showing the relation existing between these people, and their conduct and actions, and for that purpose are competent and should be given such weight as you gentlemen may think they are entitled to."

#### LVI.

The District Court erred in its charge to the jury as follows:

"There has also been some testimony to the effect that charges of illegal combination were

made to the directors of the Oregon Company in June, 1916, and perhaps later. These charges culminated, as you will recall, in certain suits or actions brought by Aman Moore against certain officers or directors of the Oregon Company, and also resulted in the appointment of a stockholder committee, to investigate these charges. The opinion of this committee, or of any director, as to the truth of the charges, [803] is quite immaterial, and should be disregarded by you. The fact that such charges were made, however, may be considered by you in connection with the manner of conducting the business of the company, and you may compare what was done before and after the charges were made and these suits filed, if there was any change in the manner of doing business, in passing upon the guilt or innocence of the defendants; and it is for you to determine whether sales, if any, made in Washington, after the making of these charges, were designed or intended for the purpose of evading such charges."

and particularly the District Court erred in that portion of said charge as follows:

" . . . The fact that such charges were made, however, may be considered by you in connection with the manner of conducting the business of the company, and you may compare what was done before and after the charges were made and these suits filed, if there was any change in the manner of doing business, in

passing upon the guilt or innocence of the defendants; and it is for you to determine whether sales, if any, made in Washington, after the making of these charges, were designed or intended for the purpose of evading such charges."

## LVII.

The District Court erred in that portion of its charge, which is as follows:

"Mr. Butchart, however, while upon the stand, testified that he did not make certain statements attributed to him by Aman Moore, but said nothing about the letters written [804] by him to Aman Moore; nor did he say anything about the meeting in San Francisco, referred to in these letters, nor offer any explanation of the letters, or any other statements contained therein. Now this was his privilege, and being a defendant he could not be required to say more if he did not desire to do so, nor could he be cross-examined as to matters not covered by the direct testimony, but upon passing upon the evidence in this case for the purpose of finding the facts, you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted, in that case, to comment unfavorably upon the defendant's silence.



But where a defendant elects to come upon the witness stand and testify, he then subjects himself to the same ruling that apply to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the circumstances, in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence, if there is any against him, he would have done so."

and the District Court erred particularly in that portion of the charges as follows:

" . . . . nor did he say anything about the meeting in San Francisco referred to in these letters." [805]

#### LVIII.

The District Court erred in that portion of its charge wherein the trial court instructed the jury in regard to certain letters written by Aman Moore to R. P. Butchart, and which contained statements or suggestions concerning fixing prices by allotting territory by agreement with other manufacturers, and particularly to that portion of the charge wherein the Court submitted to the jury said letters as evidence against the defendant R. P. Butchart, if

"it appears that he acquiesced in the sugges-

tions, or acted thereon, or combined with other manufacturers in accordance with the statements or suggestions.”

### LIX.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

“Portland cement is a mineral product. Certain earths or minerals, principally lime and clay, are mixed in specific proportions, fused by intense heat into a new uniform composition known as klinker and this klinker ground to an impalpable powder with certain ingredients added, is the Portland cement of commerce. It is sold by barrels, for in the earlier stages of the industry the containers were always wooden barrels. The net content of such barrel was 376 pounds of cement. In the later development of the industry the practice obtained and now rules upon the Pacific coast of packing the cement in sacks, each sack weighing 94 pounds. Thus, four of these sacks equal one barrel, but the sales are still in terms of barrels, and mill capacity is spoken of in terms of barrels. When of a given mill it is said that it has a capacity of 1,000 barrels, it means that working to capacity that mill can output 1,000 [806] barrels a day. In the sales of cement on the Pacific coast provision is usually made to compensate the ultimate purchaser for return of sacks in

good condition. In this regard the usual allowance is from  $7\frac{1}{2}$  to 10 cents per sack.

To the successful manufacturer of cement a factory requires its limestone quarry and its clay deposit; the other ingredients, such as gypsum, etc., usually being purchased abroad. The rough material brought to the mill are subjected to a drying heat, to grinding to a given degree of fineness, to admixture in due proportions, and then to an intense heat in kilns. The product of this is known as klinker. The klinker marks the termination of the first stage in the production of cement. It may be heaped in piles and exposed to the air and improves, rather than deteriorates by this from the beneficial chemical changes which result from the action of the oxygen in eliminating the free lime which the klinker may contain. In the second process of manufacture the klinker is ground to an extreme fineness, thoroughly mixed with the minor ingredients and transported to the warehouse or packing house as the completed product ready for the market. The principal ingredients being furnished by the earth in a state of nature, the cost of these in their primitive state is not as a rule great. That cost is principally composed of the investment in mill machinery and of labor. The mill machinery is complicated and expensive—dryers, grinders, kilns, conveyors, etc. Much heat being necessary, the fuel item is an extremely heavy one. Owing to the nature of the process by

which cement is made and the necessary application of intense heat, the kilns and other machinery are subject to rapid deterioration in use. The life of a cement mill in operation is ten years, or in other words [807] the necessary renewals and replacements have in ten years substituted a completely new set of machinery for the original."

#### LX.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Portland cement is an article of commerce and under the law must be tested before it is placed upon the market, and any brand of Portland cement which stands these tests and fulfills the requirements of the law can be used in all work in which Portland cement is used."

#### LXI.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Every manufacturer has the right to ascertain in any legitimate way the price at which goods manufactured by others and competing with the product of his mills are sold. Competing manufacturers issuing price lists from time to time may legally exchange their respective price lists. Competing manufacturers may lawfully advise one another of the territory in which their manufactured products are marketed and may lawfully



advise one another of the prices at which their respective products are put upon the market. Giving and receiving such information is not forbidden by law."

## LXII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"It is therefore a natural conclusion that the mere fact that a manufacturer of Portland cement in the State of California, Oregon, and Washington may have issued from time to time price lists or circulars stating the price at which and terms on which the product of his factory would be sold and that a similar price list or circular [808] letter may have been issued by some or by all other manufacturers of Portland cement in said states and that in all of said price lists or circular letters issued at or about the same time the price of Portland cement is the same and the terms of sale the same, will not in itself constitute a violation of the statute or be in contravention of the law, nor can you find the defendants guilty upon evidence of this character alone even though you should find that every manufacturer sold his product at the same price and upon the same terms. To constitute a violation of the law, there must also be evidence which satisfies your minds beyond a reasonable doubt that such prices or terms were fixed by agreement or combination between the several

manufacturers and that defendants Butchart and Moore were parties to such agreement or combination.”

### LXIII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

“Every manufacturer of Portland cement has the legal right to determine from time to time the territory in which, the parties to whom, the prices at which, and the manner in which the product of his factory shall be sold. He may also issue price lists or circulars and employ any other method which he may desire to advertise or sell the product of his mill. Such conduct is not a violation of the statute under which the defendants are indicted or in contravention of any law.”

### LXIV.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows: [809]

“Every commodity such as Portland cement is under normal business conditions put upon the market for sale and sold and the average price at which such commodity is sold is commonly designated as the market or market price. Under normal conditions Portland cement is sold in this manner and the price at which it is so sold from time to time would constitute the market price at the time. Such market price naturally changes from time to

time due to cost of manufacture, cost of transportation, supply and demand, and to other causes too numerous to enumerate. Each sale affects and therefore each manufacturer in offering and selling his factory's output necessarily contributes to making the market price and, of course, such action on his part is not in violation of the law. It is only the making or fixing of the market price by agreement, combination, or conspiracy with other manufacturers which is prohibited, so that if you are not satisfied by the evidence beyond a reasonable doubt that either of the defendants, **Butchart or Moore**, as officers or agents of Oregon Portland Cement Co., did agree or combine or conspire with other manufacturers of Portland cement in the states above mentioned to make or fix the market price for Portland cement or agree or combine or conspire with other manufacturers to limit the territory in which Oregon Portland Cement Company should sell its products or agree or combine or conspire with other manufacturers to limit the territory or fix the price at which the products of the mill of some other manufacturers should be sold, you must return a verdict of not guilty."

#### LXV.

The District Court erred in refusing to charge the [810] jury as duly requested by this defendant in writing, as follows:

"I have permitted the government to introduce evidence tending to show that in 1915 the Spokane, Portland & Seattle Railway Company promised to reduce its freight charges upon Portland cement from Irwin, Washington, to Portland, Oregon, and Vancouver, Washington, and that the Western Washington Cement Manufacturers and some of the Northern California Cement Manufacturers combined to defeat such proposed change in the freight rate and that they succeeded in defeating the same by promising to supply cement from their mills for the Interstate Bridge at the price at which cement for this purpose was offered by the Irwin plant if the rate had been installed. Such action on the part of the Western Washington and California manufacturers, if proven to your satisfaction, would not constitute a violation of the statute on which this indictment is based."

#### LXVI.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the anti-trust act was passed, a definite legal signification. Not every combination in restraint of competition is in restraint of trade. But it does not necessarily follow that restraint of competition is a restraint of interstate trade and commerce. The



determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be [811] maintained wherever their abolition would tend to suppress or diminish interstate trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several states.' To what extent the anti-trust act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated, and it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

The language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. Restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade."

#### LXVII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

“Even if you are satisfied from the evidence that there was an agreement or conspiracy or combination or a concert of action among the manufacturers of Portland cement in the states above mentioned to define the territory in which or the prices at which the product of the several factories or mills should be sold, yet such agreement, conspiracy, or combination is not necessarily within the prohibition of the statute, for to constitute a violation [812] of the statute you must also be satisfied from the evidence beyond a reasonable doubt that said manufacturers thereby intended to restrain interstate commerce in cement in the market for Portland cement to an unreasonable degree or that interstate commerce in cement was thereby restrained to an unreasonable extent.”

#### LXVIII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

“It is entirely lawful for anyone to do what he can to prevent a transportation company from putting in a freight rate which he may deem unjust and discriminatory, and which he may think will injuriously and unjustly affect his business. Any number of persons who may be similarly situated may join in opposing the installation of such freight rate. It is in evidence that the Western Washington Cement Manufacturers and some of the Northern Cali-

ifornia Cement Manufacturers combined in 1915 to defeat a proposed change or reduction in the freight rate on cement from Irwin, Washington, to Portland, Oregon, and Vancouver, Washington, but this action on their part was legitimate and lawful, and does not constitute any violation of the Sherman Act."

#### LXIX.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Manufacturers of Portland cement may lawfully ascertain the markets or territories in which and the price or prices at which other manufacturers of Portland cement sell or market their products, and having this information or [813] knowledge may use the same in marketing their own product so long as they do not agree or combine or conspire with such other manufacturers, but act independently of them. It is only actions taken by agreement or combination or conspiracy with other manufacturers which the law prohibits."

#### LXX.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"The indictment charges that an agreement, combination, or conspiracy was entered into between certain parties representing certain manufacturers of Portland cement in the states

of California, Oregon, and Washington to control or limit the territory in which the output of the several factories should be marketed and to fix the prices at which it should be sold and that defendants Butchart and Moore as the officers and agents of Oregon Portland Cement Company were parties to or became parties to such agreement, combination, or conspiracy, and that such agreement, conspiracy, or combination was entered into for the purpose of restraining interstate commerce in Portland cement in said states and that such interstate commerce was thereby actually restrained. Before you can find either of the defendants Butchart or Moore guilty, you must therefore find or be satisfied by the evidence beyond a reasonable doubt, first, that such agreement, conspiracy, or combination was entered into by the defendants named in the indictments or by some of them; second, that such agreement, conspiracy, or combination was entered into for the purpose of restraining interstate commerce in Portland cement in said states; third, that it did restrain or [814] restrict such commerce; fourth, that the defendant or defendants Butchart and Moore were parties to or became parties to such agreement, conspiracy, or combination; fifth, that the defendant or defendants Butchart and Moore were parties to or became parties to said agreement, conspiracy, or combination as officers or agents of Oregon Portland Cement Company; and, sixth,



that interstate commerce in said states in Portland cement would necessarily be restrained or was actually restrained by said alleged agreement, conspiracy, or combination to an unreasonable extent or degree. If you find that one of the defendants Butchart or Moore was not a party to such agreement, combination, or conspiracy, you must find him not guilty, and if you find that neither of the defendants Butchart or Clark M. Moore was a party thereto, you must return a verdict of not guilty in favor of each of said defendants.”

## LXXI.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

“There is no evidence in this case which tends to show that either R. P. Butchart or Clark M. Moore monopolized or attempted to monopolize the trade or commerce in Portland cement among the states or combined with any person or persons to monopolize any part of the trade or commerce in Portland cement among the several states. You will therefore return a verdict in their favor in the second count of the indictment.”

## LXXII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows: [815]

“The evidence before you is not sufficient to establish the guilt of the defendant R. P.

Butchart and you are hereby directed to return a verdict in his favor of Not Guilty."

LXXIII.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"The evidence before you is not sufficient to establish the guilt of the defendant Clark M. Moore and you are hereby directed to return a verdict in his favor of Not Guilty."

LXXIV.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Certain letters have been introduced, written by Aman Moore and addressed to R. P. Butchart, which contain statements or suggestions concerning the fixing of price, the allotment of territory, or agreements with other manufacturers. I instruct you that statements or suggestions made by Aman Moore recited or contained in such letters are not evidence against said Butchart and do not tend to prove the connection of said Butchart with any such agreements or combinations, unless it be further shown independent of such statements or suggestions so made by said Aman Moore and contained in said letters, that said Butchart acquiesced in said statements and acted thereon or combined with other cement manufacturers in accordance with the state-

ments or suggestions so made by said Aman Moore and contained in said letters."

LXXV.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows: [816]

"Letters have been admitted in evidence written by Aman Moore to R. P. Butchart, and by R. P. Butchart to Aman Moore, dated prior to April 14, 1916, the date upon which Clark Moore was selected or appointed Sales Manager for the Oregon Portland Cement Company. Any statements contained in such letters or correspondence are not evidence for or against Clark Moore, unless you should find that such letters show a combination, conspiracy, or agreement as charged in the indictment, and that after Clark Moore became Sales Manager of the Oregon Portland Cement Company on April 14, 1916, he acted in furtherance of such combination or conspiracy and aided, abetted, or assisted in carrying out and performing the agreements so made."

LXXVI.

The District Court erred in refusing to charge the jury as duly requested by this defendant in writing, as follows:

"Various letters have been introduced, written by officials or associates of officials from cement manufacturers in Washington and California to defendants Clark Moore and R. P. Butchart. I instruct that any statements, sug-

gestions, or requests contained in such letters are not to be taken or deemed as evidence of the guilt or innocence of defendants R. P. Butchart and Clark Moore, unless it be further shown by evidence independent of the statements contained in such letters that defendants, Butchart or Clark Moore, acquiesced in such statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions so made or contained in said letters.”

LXVII.

The District Court erred in overruling and denying [817] the motion and application of this defendant to set aside the verdict of the jury returned in this cause and grant a new trial to this defendant and in refusing to set aside said verdict and grant a new trial to this defendant.

CLARK M. MOORE,  
By WIRT MINOR,  
One of His Attorneys.

TEAL, MINOR & WINFREE,  
WIRT MINOR,  
A. B. WINFREE,

Attorneys for Defendant, Clark M. Moore.

Service of the within assignment of errors and receipt of a copy is hereby admitted this 18th day of August, 1921.

HALL S. LUSK,  
Assistant United States Attorney.  
Of Attorneys for Defendant in Error.

Filed August 18, 1921. G. H. Marsh, Clerk.



AND AFTERWARDS, to wit, on Thursday, the 18th day of August, 1921, the same being the 40th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [819]

In the District Court of the United States for the District of Oregon.

No. C—7308.

UNITED STATES OF AMERICA

vs.

S. H. COWELL, W. H. GEORGE, F. G. DRUM,  
R. B. HENDERSON, FRANK W. ERLIN,  
WILLIAM G. HENSHAW, TYLER HENSHAW,  
GEORGE T. CAMERON, FRED H. MUHS,  
JOHN C. EDEN, A. A. SUTHERLAND,  
A. F. COATS, ALEXANDER BAILLIE,  
W. P. CAMERON, R. P. BUTCHART,  
and CLARK M. MOORE,

Defendants.

**Order Allowing Writ of Error, Staying Proceedings and Fixing the Amount of Bond.**

R. P. Butchart, defendant in the above-entitled cause, having filed in this court a petition for an order allowing a writ of error in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit and staying proceedings upon the judgment heretofore entered in this cause upon

the verdict of the jury duly returned and filed in this cause until the determination of said writ of error, and the said petition coming on at this time to be heard upon the motion of the said R. P. Butchart, and it appearing to the Court that the said defendant R. P. Butchart has heretofore filed a petition for such writ of error and therewith an assignment of errors, and the Court being fully advised in the premises, it is considered, ordered, adjudged, and decreed that a writ of error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore rendered and entered in this court and in this cause on the 23d day of February, 1921, against the said R. P. Butchart upon said verdict, and it is further considered, ordered, adjudged, and decree that upon the giving by the said defendant R. P. Butchart of security, with proper surety or sureties, acceptable to this Court, in the amount of eight thousand dollars (\$8000.00), the proceedings of this court be suspended and stayed until the determination [819½] of such writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

Done and dated in open court this 18th day of August, 1921.

R. S. BEAN,  
District Judge.

Service of the within order and receipt of a copy is hereby admitted this 18th day of August, 1921.

HALL S. LUSK,  
Assistant United States Attorney,  
Of Attorneys for Defendant in Error.

Filed August 18, 1921. G. H. Marsh, Clerk.  
[820]

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AND AFTERWARDS, to wit, on Thursday, the 18th day of August, 1921, the same being the 40th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [821]

In the District Court of the United States for the  
District of Oregon.

C—7308.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

S. H. COWELL, W. H. GEORGE, F. G. DRUM,  
R. B. HENDERSON, FRANK W. ERLIN,  
WILLIAM G. HENSHAW, TYLER HENSHAW,  
GEORGE T. CAMERON, FRED H. MUHS,  
JOHN C. EDEN, A. A. SUTHERLAND,  
A. F. COATS, ALEXANDER BAILLIE,  
W. P. CAMERON, R. P. BUTCHART, and CLARK M. MOORE,

Defendants.

**Order Allowing Writ of Error, Staying Proceedings and Fixing the Amount of Bond.**

Clark M. Moore, defendant in the above-entitled cause, having filed in this court a petition for an

order allowing a writ of error in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit and staying proceedings upon the judgment heretofore entered in this cause upon the verdict of the jury duly returned and filed in this cause until the determination of said writ of error, and the said petition coming on at this time to be heard upon the motion of the said Clark M. Moore, and it appearing to the Court that the said defendant Clark M. Moore has heretofore filed a petition for such writ of error and therewith an assignment of errors, and the Court being fully advised in the premises, it is considered, ordered, adjudged, and decreed that a writ of error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore rendered and entered in this court and in this cause on the 23d day of February, 1921, upon said verdict on said 23d day of February, 1921, against the defendant Clark M. Moore, and it is further considered, ordered, adjudged, and decreed that upon the giving by the said defendant Clark M. Moore of security, with proper surety or sureties, acceptable to this Court in the amount of five thousand dollars (\$5,000.00), the proceedings of this court be suspended and stayed until the determination [822] of such writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

Done and dated in open court this 18th day of August, 1921.

R. S. BEAN,  
District Judge.



Service of the within order and receipt of a copy is hereby admitted this 18th day of August, 1921.

HALL S. LUSK,

Assistant United States Attorney,  
Of Attorneys for Defendant in Error.

Filed August 18, 1921. G. H. Marsh, Clerk.  
[823]

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AND AFTERWARDS, to wit, on Thursday, the 18th day of August, 1921, the same being the 40th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [824]

In the District Court of the United States for the  
District of Oregon.

C—7308.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, JOHN C. EDEN, A. A. SUTHERLAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BUTCHART, and CLARK M. MOORE,

Defendants.

**Order Fixing Amount of Supersedeas Bond.**

The defendants, R. P. Butchart and Clark M. Moore, having sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit and application having been made to fix the amount of the supersedeas bond in order that proceedings may be stayed pending judgment of the said Circuit Court of Appeals: It is hereby ORDERED that the amount of the supersedeas bond to be given by the defendant R. P. Butchart be and the same is hereby fixed in the sum of eight thousand dollars (\$8,000.00), and that the amount of the supersedeas bond to be given by the defendant Clark M. Moore be and the same is hereby fixed at the sum of five thousand dollars (\$5,000.00).

Dated this 18th day of August, 1921.

R. S. BEAN,  
District Judge.

Service of the within order and receipt of a copy is hereby admitted this 18th day of August, 1921.

HALL S. LUSK,  
Assistant United States Attorney,  
Of Attorneys for Defendant in Error.

Filed August 18, 1921. G. H. Marsh, Clerk.  
[825]

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AND AFTERWARDS, to wit, on the 19th day of August, 1921, there was duly filed in said court a bond on writ of error of R. P. Butchart, in words and figures as follows, to wit: [826]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

S. H. COWELL, W. H. GEORGE, F. G. DRUM,  
R. B. HENDERSON, FRANK W. ERLIN,  
WILLIAM G. HENSHAW, TYLER HEN-  
SHAW, GEORGE T. CAMERON, FRED  
H. MUHS, JOHN C. EDEN, A. A. SUTH-  
ERLAND, A. F. COATS, ALEXANDER  
BAILLIE, W. P. CAMERON, R. P. BUT-  
CHART, and CLARK M. MOORE,

Defendants.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
That I, R. P. Butchart, as principal, and United  
States Fidelity and Guaranty Company, of Balti-  
more, Maryland, as surety, are held and firmly  
bound unto the United States of America, in the sum  
of Eight Thousand Dollars (\$8,000.00), lawful money  
of the United States of America for the payment of  
which sum well and truly to be made we and each  
of us hereby bind ourselves, our successors, and  
assigns, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of  
August, 1921.

The condition of this obligation is such that:

Whereas the above-named R. P. Butchart  
has sued out a writ of error in the United States  
Circuit Court of Appeals for the Ninth Circuit,

to bring up for review before said United States Circuit Court of Appeals for the Ninth Circuit a judgment rendered by the District Court of the United States for the District of Oregon upon a verdict in the above-entitled cause, and

Whereas said R. P. Butchart has prayed for a reversal by said United States Circuit Court of Appeals for the Ninth [827] Circuit of said judgment rendered by the said District Court of the United States for the District of Oregon, and desires a stay of proceedings in said District Court of the United States for the District of Oregon until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit:

Now, therefore, if said R. P. Butchart shall prosecute his writ of error to effect, and answer all damages and costs that may be awarded against him if he fail to make his plea good, including just damages for delay and costs and interest on said writ of error, then the above obligation to be void, otherwise to remain in full force and virtue.

R. P. BUTCHART.

By WIRT MINOR,

One of His Attorneys.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

(Seal)

By H. WESTENFELDER,

Its Attorney in Fact.

Countersigned: J. L. HARTMAN COM-  
PANY.

By H. WESTENFELDER,

General Agents.



Approved, August 19, 1921.

R. S. BEAN,  
Judge.

Service of the within bond and receipt of a copy  
is hereby admitted this 18th day of August, 1921.

HALL S. LUSK,  
Assistant United States Attorney,  
Of Attorneys for Defendant in Error.

Filed August 19, 1921. G. H. Marsh, Clerk.  
[828]

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AND AFTERWARDS, to wit, on the 19th day of  
August, 1921, there was duly filed in said court  
a bond on writ of error of Clark M. Moore, in  
words and figures as follows, to wit: [829]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

S. H. COWELL, W. H. GEORGE, F. G. DRUM,  
R. B. HENDERSON, FRANK W. ERLIN,  
WILLIAM G. HENSHAW, TYLER HEN-  
SHAW, GEORGE T. CAMERON, FRED  
H. MUHS, JOHN C. EDEN, A. A. SUTH-  
ERLAND, A. F. COATS, ALEXANDER  
BAILLIE, W. P. CAMERON, R. P. BUT-  
CHART, and CLARK M. MOORE,

Defendants.

### **Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, That I, Clark M. Moore, as principal, and United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America, in the sum of Five Thousand Dollars (\$5,000.00), lawful money of the United States of America, for the payment of which sum well and truly to be made we and each of us bind ourselves, our successors, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of August, 1921.

The condition of this obligation is such that:

Whereas the above-named Clark M. Moore has sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, to bring up for review before said United States Circuit Court of Appeals for the Ninth Circuit a judgment rendered by the District Court of the United States for the District of Oregon upon a verdict in the above-entitled cause, and

WHEREAS said Clark M. Moore has prayed for a reversal by said United States Circuit Court of Appeals for the Ninth [830] Circuit of said judgment rendered by the said District Court of the United States for the District of Oregon, and desires a stay of proceedings in said District Court of the United States for the District of Oregon until the determination of said writ of error by said

United States Circuit Court of Appeals for the Ninth Circuit:

Now, therefore, if said Clark M. Moore shall prosecute his writ of error to effect, and answer all damages and costs that may be awarded against him if he fail to make his plea good, including just damages for delay and costs and interest on said writ of error, then the above obligation to be void, otherwise to remain in full force and virtue.

CLARK M. MOORE.

By WIRT MINOR,

One of His Attorneys.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

(Seal)

By H. WESTENFELDER,

Its Attorney in Fact.

Countersigned: J. H. HARTMAN & COMPANY.

By H. WESTENFELDER,

General Agents.

Approved, August 19, 1921.

R. S. BEAN,

Judge.

Service of the within bond and receipt of a copy is hereby admitted this 18th day of August, 1921.

HALL S. LUSK,

Assistant United States Attorney,  
Of Attorneys for Defendant in Error.

Filed August 19, 1921. G. H. Marsh, Clerk.

[831]

AND AFTERWARDS, to wit, on the 25th day of August, 1921, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [832]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff, .

vs.

S. H. COWELL, W. H. GEORGE, F. G. DRUM,  
R. B. HENDERSON, FRANK W. ERLIN,  
WILLIAM G. HENSHAW, TYLER HEN-  
SHAW, GEORGE T. CAMERON, FRED H.  
MUHS, JOHN C. EDEN, A. A. SUTHER-  
LAND, A. F. COATS, ALEXANDER BAIL-  
LIE, W. P. CAMERON, R. P. BUTCHART,  
and CLARK M. MOORE,

Defendants.

**Praecipe for Transcript of Record.**

To the Clerk of the District Court of the United  
States for the District of Oregon:

You are hereby requested to prepare record in  
the above-entitled cause for the United States  
Circuit Court of Appeals for the Ninth Circuit,  
said record to contain and consist of the following  
instruments:

1. The indictment.
2. The demurrer to the indictment of the de-  
fendants R. P. Butchart and Clark M. Moore.



3. The opinion of the Court overruling the demurrer to the indictment.
4. Pleas or plea of each of the several defendants indicted.
5. The judgment of the Court against each of the defendants, who subsequently entered pleas of guilty.
6. The verdict of the jury against R. P. Butchart and Clark M. Moore.
7. The motion and application to set aside the verdict and grant a new trial.
8. The opinion of the Court overruling the application and motion of the defendants R. P. Butchart and Clark M. Moore to set aside the verdict and grant a new trial. [833]
9. The bill of exceptions.
10. All stipulations between counsel.
11. All orders made upon stipulation.
12. All orders extending time.
13. The judgment of the Court against defendants R. P. Butchart and Clark M. Moore.
14. The petition for writ of error of R. P. Butchart.
15. The assignment of error of R. P. Butchart.
16. The petition of Clark M. Moore for a writ of error.
17. The assignment of errors of Clark M. Moore.
18. The order providing for supersedeas bond.
19. The order allowing writ of error to R. P. Butchart.

20. The order allowing writ of error to Clark M. Moore.

21. The supersedeas bond of R. P. Butchart.

22. The supersedeas bond of Clark M. Moore.

WIRT MINOR,

Of Attorneys for the Defendants R. P. Butchart  
and Clark M. Moore.

Service of the within praecipe and receipt of a copy is hereby admitted this 25th day of August, 1921.

HALL S. LUSK,  
Assistant United States Attorney,  
Of Attorneys for Defendant in Error.

Filed August 25, 1921. G. H. Marsh, Clerk.  
[834]

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AND AFTERWARDS, to wit, on the 1st day of May, 1922, there was duly filed in said court, a designation by defendants of exhibits to be included in bill of exceptions, in words and figures as follows, to wit: [835]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. P. BUTCHART, CLARKE M. MOORE, et al.,  
Defendants.

**Designation by Defendants of Exhibits to be Included in Bill of Exceptions.**

Mr. G. H. Marsh, Clerk of the Above-entitled Court:

In accordance with stipulation heretofore filed herein, you are hereby requested to attach to transcript as part of the bill of exceptions copy of each of the following exhibits, to wit:

Plaintiff's Exhibits Nos. 40, 50, 52, 74, 76, 78, 79, 80, 98, 105, 131 and 142; Defendants' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 28, 29, 96, 97 and 117.

Very truly yours,

TEAL, MINOR & WINFREE.

Designation of exhibits to be copied—1.

Filed May 1, 1922. G. H. Marsh, Clerk. [836]

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AND AFTERWARDS, to wit, on the 24th day of July, 1922, there was duly filed in said court a designation by plaintiff of exhibits to be included in bill of exceptions, in words and figures as follows, to wit: [837]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

S. H. COWELL et al.,

Defendants.

**Designation by Plaintiffs of Exhibits to be Included in Bill of Exceptions.**

To G. H. Marsh, Clerk of the Above-entitled Court:

Under paragraph four of stipulation dated April 29, 1921, the following exhibits are designated to be printed as a part of the transcript of record upon the writ of error herein, to wit:

Plaintiff's Exhibits Nos. 20, 31, 33, 39, 45, 51, 55, 56, 57, 59, 61, 62, 68, 70, 72, 73, 75, 78, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 103, 104, 116, 117, 119, 138, 145, 146, 147, 148, 151, 152, 153, 163.

LESTER W. HUMPHREYS,  
United States Attorney,

Filed July 24, 1922. G. H. Marsh, Clerk. [838]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writs of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from 5 to 838, inclusive, constitute the transcript upon writs of error in a cause in said court, in which the United States of America is plaintiff and defendant in error, and R. P. Butchart and Clark M. Moore are defendants and plaintiffs



in error; that the said transcript has been prepared by me in accordance with the praecipe filed by said plaintiffs in error, the orders of said Court and notices by the parties hereto, and the said transcript is a full, true and complete transcript of the record and proceedings which the said praecipe, orders of Court and notices designated to be included therein, as the same appear of record and on file at my office and in my custody.

And I further certify that I return with the said transcript of record attached, the original writ of error issued upon the petition of the plaintiff in error R. P. Butchart and original writ of error issued upon the plaintiff in error Clark M. Moore and the original citations filed in said cause; and I further certify that the cost of the foregoing transcript is \$240.70, and that the same has been paid by the said plaintiff in error.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said court at Portland in said District this 26th day of August, 1922.

[Seal]

G. H. MARSH,

Clerk. [839]

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[Endorsed]: No. 3919. United States Circuit Court of Appeals for the Ninth Circuit. R. P. Butchart and Clark M. Moore, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error

to the United States District Court of the District of Oregon.

Filed August 29, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the District Court of the United States for the  
District of Oregon.

No. C—7308.

August 30, 1921.

THE UNITED STATES OF AMERICA

VS.

R. P. BUTCHART, CLARK M. MOORE.

**Order Extending Time to and Including November 1, 1921, to File Record and Docket Cause.**

Now, at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record in the above-entitled cause and docketing the cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including November 1, 1921.

R. S. BEAN,  
Judge.

[Endorsed]: No. 3919: United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to

and Including Nov. 1, 1921, to File Record and Docket Cause. Filed Sept. 2, 1921. F. D. Monckton, Clerk. Refiled Aug. 29, 1922. F. D. Monckton, Clerk.

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In the District Court of the United States for the District of Oregon.

No. 7308.

October 31, 1921.

UNITED STATES OF AMERICA

vs.

R. P. BUTCHART and CLARK M. MOORE,  
Defendants.

**Order Extending Time to and Including December 15, 1921, to File Record and Docket Cause.**

Now at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including December 15, 1921.

CHAS. E. WOLVERTON,  
Judge.

[Endorsed]: No. 3919. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Dec. 15, 1921, to File Record and Docket Cause. Filed Dec. 8, 1921. F. D. Monck-

ton, Clerk.    Refiled Aug. 29, 1922. F. D. Monckton,  
Clerk.

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In the District Court of the United States for the  
District of Oregon.

No. C—7308.

December 6, 1921.

UNITED STATES OF AMERICA

vs.

R. P. BUTCHART and CLARK M. MOORE.

**Order Extending Time to and Including February  
15, 1922, to File Record and Docket Cause.**

Now, at this day, comes the plaintiff by Mr. Lester W. Humphreys, United States Attorney, and the defendants above named by Mr. A. B. Winfree, of counsel, whereupon on motion of said defendants, the United States Attorney consenting thereto, IT IS ORDERED that the time for filing the transcript of record upon writ of error in the above cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be, and same is hereby, extended to and including February 15, 1922.

R. S. BEAN,  
Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Feb. 15, 1922 to File Record and



Docket Cause. Filed Dec. 8, 1921. F. D. Monckton, Clerk. Refiled Aug. 29, 1922. F. D. Monckton, Clerk.

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In the District Court of the State of Oregon for  
the District of Oregon.

February 10, 1922.

THE UNITED STATES OF AMERICA

vs.

R. P. BUTCHART and CLARK M. MOORE.

**Order Extending Time to and Including March 31,  
1922, to File Record and Docket Cause.**

Now, at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record on writ of error in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby, extended to and including March 31st, 1922.

R. S. BEAN,  
Judge.

[Endorsed]: No. 3919. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Mar. 31, 1922, to File Record and Docket Cause. Filed Apr. 19, 1922. F. D. Monckton, Clerk. Refiled Aug. 29, 1922. F. D. Monckton, Clerk.

In the District Court of the United States for the  
District of Oregon.

March 27, 1922.

THE UNITED STATES OF AMERICA

vs.

R. P. BUTCHART and CLARK M. MOORE.

**Order Extending Time to and Including April 30,  
1922, to File Record and Docket Cause.**

Now at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record on writ of error in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby, extended to and including April 30, 1922.

R. S. BEAN,  
Judge.

[Endorsed]: No. 3919. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including April 30, 1922, to File Record and Docket Cause. Filed Apr. 19, 1922. F. D. Monckton, Clerk. Refiled Aug. 29, 1922. F. D. Monckton, Clerk.

In the District Court of the United States for the  
District of Oregon.

No. 7308.

April 28, 1922.

THE UNITED STATES OF AMERICA

vs.

R. B. BUTCHART and CLARK M. MOORE.

**Order Extending Time to and Including June 1,  
1922, to File Record and Docket Cause.**

Now, at this day, for good cause shown, IT IS  
ORDERED that the time for filing the transcript  
of record on writ of error in the above-entitled  
cause and docketing the same in the United States  
Circuit Court of Appeals for the Ninth Circuit may  
be, and the same is hereby, extended to and includ-  
ing June 1, 1922.

R. S. BEAN,  
Judge.

In the District Court of the United States for the  
District of Oregon.

No. 7308.

June 1, 1922.

THE UNITED STATES OF AMERICA

vs.

R. P. BUTCHART and CLARK M. MOORE.

**Order Extending Time to and Including July 1,  
1922, to File Record and Docket Cause.**

Now, at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including July 1, 1922.

R. S. BEAN,  
Judge.

In the District Court of the United States for the  
District of Oregon.

June 29, 1922.

THE UNITED STATES

vs.

R. P. BUTCHART et al.

**Order Extending Time to and Including August 1,  
1922, to File Record and Docket Cause.**

Now, at this day, for good cause shown, IT IS ORDERED that the time in which to file transcript on appeal in the above cause and to docket the same in the U. S. Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including August 1, 1922.

R. S. BEAN,  
Judge.



In the District Court of the United States for the  
District of Oregon.

July 29, 1922.

THE UNITED STATES

vs.

R. P. BUTCHART et al.,

Defendants.

**Order Extending Time to and Including September  
1, 1922, to File Record and Docket Cause.**

Now, at this day, for good cause shown, IT IS  
ORDERED that the time in which to file transcript  
on appeal in the above cause and to docket the same  
in the United States Circuit Court of Appeals be,  
and the same is hereby, extended to and including  
September 1, 1922.

R. S. BEAN,

Judge.

In the District Court of the United States for the  
District of Oregon.

No. 7308.

August 26, 1922.

THE UNITED STATES OF AMERICA

vs.

R. P. BUTCHART and CLARK M. MOORE.

**Order Extending Time to and Including September  
15, 1922, to File Record and Docket Cause.**

Now, at this day, for good cause shown, IT IS ORDERED, that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended to and including September 15, 1922.

CHAS. E. WOLVERTON,  
Judge.

[Endorsed]: No. 3919. United States Circuit Court of Appeals for the Ninth Circuit. Orders under Subdivision 1 of Rule 16 Enlarging Time to and Including Sept. 15, 1922, to File Record and Docket Cause. Filed Aug. 29, 1922. F. D. Monckton, Clerk. Refiled Aug. 29, 1922. F. D. Monckton, Clerk.

# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

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R. P. BUTCHART and CLARK M. MOORE,  
*Plaintiffs in Error,*

vs.

UNITED STATES OF AMERICA,  
*Defendant in Error.*

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## Brief of Plaintiffs in Error

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TEAL, WINFREE, JOHNSON & McCULLOCH

A: B. WINFREE,

1016 Splding Building, Portland, Ore.

*Attorneys for Plaintiffs in Error.*





# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

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R. P. BUTCHART and CLARK M. MOORE,  
*Plaintiffs in Error,*

*vs.*

UNITED STATES OF AMERICA,  
*Defendant in Error.*

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## Brief of Plaintiffs in Error

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*Upon Writ of Error to the District Court of the United  
States for the District of Oregon.*

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## STATEMENT OF THE CASE

The defendants (plaintiffs in error here) together with officers of certain California and Washington cement companies, were indicted in two counts involving alleged violations of what is commonly called "The Sherman Anti-Trust Act," an Act of Congress approved July 2, 1890. Count One alleges that during ten years last past cement was manufactured at divers places in the State of California and west of the Cascade Mountain range in the States of Washington and Oregon, and was a useful and necessary article of commerce; that said companies sold large portions of cement manufactured by them to consumers of, and dealers in such cement, whose several places of consumption and busi-

ness have been situated in others of said States than the one where said cement was so manufactured.

That since the first day of August, 1914, the various individuals named in the indictment were officers and agents of said companies; that plaintiffs in error, R. P. Butchart and Clark M. Moore, were respectively president and sales manager of the Oregon Portland Cement Company; that from the first day of August, 1914, to the finding and presentation of the indictment, defendants unlawfully and knowingly engaged in a combination in undue, unreasonable, direct and oppressive restraint of interstate trade and commerce thereafter set forth as follows:

“Said defendants so being in the active management, direction, and control of the business and affairs of said concerns as aforesaid, in their said several capacities as officers and agents of those concerns throughout said last mentioned period of time, unlawfully and knowingly have by concerted action carried on and conducted said business of said concern without any competition as to the localities in said States of Washington, Oregon and California, in which they respectively sold said cement, except as to said portion of said State of Oregon west of said Cascade Mountain range, to the extent hereinafter indicated, and without any competition as to the prices at which they would respectively sell such cement in said State of Oregon west of said Cascade Mountain Range as hereinafter specified, and unlawfully and knowingly have by concerted action prevented said Southern California company from

selling or consigning for sale its cement either in Washington or Oregon; said Northern California company from selling or consigning for sale their cement in Washington; said Washington companies from selling or consigning for sale their cement either in Oregon or California; and said Oregon company from selling or consignment for sale its cement either in Washington or California; and unlawfully and knowingly have by concerted action prevented said Northern California companies and said Oregon company from selling or consigning for sale their cement in Oregon, otherwise than upon arbitrary and non-competitive prices fixed and agreed upon between them in advance of such sales, and consignments for sale; and in consequence of said unlawful conduct on the part of said defendants, and because of the want of competition in the particulars aforesaid between said concerns, all consumers of such cement in said localities in said States of Oregon, Washington and California have been deprived of the benefits of competition as to the particulars aforesaid between said concerns so manufacturing and furnishing the same as aforesaid, and have been compelled to pay for such cement arbitrary prices, and prices greatly in excess of the prices at which they would have secured such cement if said defendants had not engaged in said unlawful combination in restraint of such trade and commerce as aforesaid."

That defendants (naming them), during the period of time from the first day of August, 1914, to the day

of the finding and presentation of the indictment, in said District of Oregon, and within the jurisdiction of said District Court of Oregon, in manner and form and by means and methods aforesaid, unlawfully and knowingly have engaged in a combination in restraint of trade and commerce among the several States.

Count Two reiterates the allegations of Count One and alleges that said defendants

“Unlawfully have, in the District of Oregon, and within the jurisdiction of this Court, monopolized said trade and commerce, it being a part of the trade and commerce among the several States.”

To such indictment defendants R. P. Butchart and Clark M. Moore filed their demurrer to Count One, on the following grounds, viz.:

First. The matters and things set forth and charged in said Count One do not constitute an offense under or against the laws or any law of the United States.

Second. That the averments of said Count One were too general, vague, indefinite and uncertain, to inform said defendants or either of them of the nature or cause of the accusations against them or either of them, or to appraise them or either of them with such reasonable certainty of the offense or offenses with which they or either of them were charged, or which they or either of them may expect to meet on the trial, as to enable them or either of them to make their defense.

Third. That said Count One did not contain a description of, or set forth or show, any combination in restraint of trade and commerce.



And said defendants also demurred to Count Two of said indictment and specified the following as grounds for said demurrer:

First. The matters and things set forth and charged in said Count Two do not constitute an offense under or against the laws or any law of the United States.

Second. That the averments of said Count Two were too general, vague, indefinite and uncertain to inform said defendants or either of them of the nature or cause of the accusations against them or either of them, or to appraise them or either of them with such reasonable certainty of the offense or offenses with which they or either of them were charged, or which they or either of them may expect to meet on the trial, as to enable them or either of them to make their defense.

Third. That said Count Two did not contain a description of, or set forth, or show, any combination to monopolize the trade and commerce, or any part of the trade and commerce among the several States of the United States.

Fourth. That the said Count Two did not state facts sufficient to charge or show that the said defendants, or either of them, have monopolized the trade or commerce or any part of the trade and commerce among the several States of the United States.

This demurrer was presented on brief and oral argument and thereafter the trial court entered an order overruling such demurrer. Thereafter the case came on upon trial and trial being had the jury returned a verdict finding defendant R. P. Butchart guilty as charged in

Count One of the indictment, and guilty as charged in Count Two of the indictment, and found Clark M. Moore guilty as charged in Count One of the indictment, and guilty as charged in Count Two of the indictment. A motion for new trial was filed, which was overruled by the Court, and the Court thereupon imposed a fine upon R. P. Butchart of Five Thousand Dollars (\$5,000), and upon said defendant Clark M. Moore in the sum of Two Thousand, Five Hundred Dollars (\$2,500).

From the judgment entered thereon the defendants, R. P. Butchart and Clark M. Moore, have prosecuted this writ urging as the principal grounds for reversal the overruling of the demurrer of these defendants to the indictment; the errors of the Court in admitting evidence which was incompetent, irrelevant and immaterial by reason of the fact that such evidence so admitted over the objection of these defendants related to matters of intrastate commerce solely, to matters which were entirely lawful and proper for these defendants and the other defendants interested or accused of violation of the law to do and perform, and to matters and things occurring prior to the organization of the Oregon Portland Cement Company, or these defendants becoming officers of said corporation, or the conduct of these defendants as officers of said corporation after the same was organized and started the manufacture and sale of cement, and which matters and things were not in any way connected with the conduct of these defendants subsequent to their becoming officers of said Oregon Portland Cement Company, and also to admission in evidence of statements made by persons to the Department

of Justice, which were prejudicial to these defendants not under oath and could have no bearing upon the trial of these defendants; also to the ruling of the Court excluding certain evidence offered by defendants, which qualified or explained the action of defendants in connection with the Oregon Portland Cement Company, and tended to qualify and explain the evidence improperly admitted by the Court; and the error committed by the trial court in its charge to the jury, or in other words, in stating the law to the jury for its guidance, and the refusal of the trial court to give certain instructions requested by these defendants. All of which points are more particularly stated in the specification of errors relied upon.

## SPECIFICATION OF ERRORS

### I.

The Court erred in overruling the demurrer of these defendants to the indictment found by the grand jury in the above entitled cause.

### II.

The Court erred in overruling the objections of these defendants to the introduction of any evidence in this cause upon the ground that the indictment does not state facts sufficient to charge a crime of any kind or any violation of the law, which objection was made in open Court before any evidence was admitted in said cause.

### III.

The Court erred in overruling the objection of these defendants to a letter from Jones to Henshaw dated

March 9, 1915, and in admitting said letter in evidence and to be read to the jury. This letter is marked "Plaintiff's Exhibit 33" and the full substance thereof is with reference to freight reduction on Interstate Bridge contract.

#### IV.

The Court erred in overruling the objection of these defendants to any evidence regarding the Interstate Bridge between Portland and Vancouver, and particularly the evidence of witness C. F. Swigert in regard to buying cement from International Portland Cement Company for \$1.65 per barrel delivered at Portland on condition that the freight rate on such cement from Spokane to Portland should be  $13\frac{1}{2}c$  per 100 lbs., and all evidence of every kind in regard to cement furnished for said Interstate Bridge or in regard to the negotiations between the witness Swigert and the cement companies other than the Oregon Portland Cement Company for the purchase of said cement for said purpose; and in admitting any evidence in regard to said matters and in regard to the proposed freight rate on cement from Spokane to Portland. The substance of said evidence is that the witness purchased cement for this purpose from the International Portland Cement Company of Spokane at \$1.65 per barrel delivered in Portland; that he had quotations from other cement companies ranging from \$1.90 to \$1.75; that the price in Spokane at that time ran from \$1.08 to \$1.15 as there was a bitter fight between the International Portland Cement Company and the Lehigh Portland Cement Company; that the witness went to the Spokane, Portland & Seattle



Railway Company's officials and they agreed to put in this rate of 131½c per hundred from Spokane to Portland on cement; that he also lined up about 60,000 barrels of cement all subject to this rate going into effect; that he saw some of the Washington Portland Cement Company people, among others Mr. Coats and that Coats said if he would not insist upon Skinner, the agent of the Spokane, Portland & Seattle Railway Company, putting in this rate he would see that the witness was protected in price; that the cement supplied to him was almost entirely Superior cement, a Washington product, or Santa Cruz cement, a California product, and that he paid for this cement \$1.65; that he never got any cement afterwards as cheap; that orders were placed with International Portland Cement Company but the cement was furnished by the Superior or Santa Cruz Cement Companies upon these orders, mostly Santa Cruz cement, and that subsequently the orders were placed directly with the Santa Cruz Cement Company in Portland, or with Mr. Bennett, agent of the Superior Company in Vancouver.

## V.

The Court erred in overruling the objection of these defendants to a contract between the Superior Portland Cement Company and the Pacific Bridge Company, and in admitting said contract in evidence and to be read to the jury. Said contract is marked "Plaintiff's Exhibit 38," and in substance is a contract between the Superior Portland Cement Company and the Pacific Bridge Company whereby Superior Portland Cement Company agreed to furnish to Pacific Bridge Company

for building the substructure of the Interstate Bridge between Portland and Vancouver at a price of \$1.65 per barrel.

## VI.

The Court erred in overruling the objection of these defendants to a letter to the Treasury Department, dated February 2, 1915, marked "Plaintiff's Exhibit 40," and in admitting said letter in evidence and to be read to the jury. Said letter is as follows:

"Treasury Department,  
Washington, D. C.

Gentlemen:

We, the undersigned dealers in building materials of this city wish to report to you the predicament we find ourselves in at the present time due to a combination made to control the sale of all cement here and also in the adjoining city of Hoquiam. This combination apparently being entered into by the following well known manufacturers of cement: The Superior Portland Cement Company, The Washington Portland Cement Company, and the Olympic Portland Cement Company of this state with head offices in Seattle; The Pacific Portland Cement Company with offices in San Francisco and also the F. G. Foster Company of Hoquiam, Washington, the latter dealers in building materials.

Now this city has been supplied through the undersigned in the past with Washington and California manufactured cements. The T. B. Darragh Company selling the cement of the Pacific Portland

Cement Company. The Aberdeen Manufacturing Company selling the cement of the Henry Cowell Lime & Cement Company, and the W. R. Lebo Company selling the cements of all three of the mentioned Washington companies.

The first of the year saw the following changes here due to this combination. Cement was raised 30c per barrel to the consumer, from \$1.90 to \$2.20 net. The agency held by the Lebo Company of the three Washington cements was taken away from them and given to the F. G. Foster Company who then opened up a branch business here with a stock of building materials. The Pacific Portland Cement Company notified the Darragh Company that they must quote cement no cheaper than \$2.30 net, or 10c above the Foster Company price, which naturally eliminated the Darragh Company from securing any cement business. The Henry Cowell Lime & Cement Company wrote the Aberdeen Manufacturing Company that they had withdrawn from the Washington market and that they would ship no more cement to Aberdeen. Now this action was taken by the California companies the first of the year in spite of the fact that they could get the business at a 30c per barrel advance in price and a 50c per barrel advance over what they received for cement here during most of the year 1914, the price then being \$1.70 net. Also, these same California companies are today shipping cement into Portland, Oregon, at a higher freight cost from San Francisco than the freight cost is to Aberdeen, and receiving for this cement in Portland 30c per bbl. less than they can

get it in Aberdeen, under the present prevailing market price.

This combination is going to work a great hardship upon us for the following reasons: we deal in all kinds of building materials and as most orders in a city the size of Aberdeen are mixed orders, consisting of cement, lime, brick, etc., etc., a buyer in nearly every instance wants his requirements from one place and as cement is usually the chief item, this combination is going to stifle competition and give the Foster Company a leverage that must soon draw the bulk of the building material business to them, to the demoralization and perhaps ruin of our business.

Now this combination must certainly be illegal and we are therefore writing you and requesting that your Department investigate this matter and if possible get relief for us.

Yours very truly,

ABERDEEN MANUFACTURING COMPANY,

.....Mgr.

W. R. LEBO & COMPANY,

.....Mgr.

T. H. DARRAGH,

.....Mgr."

## VII.

The Court erred in overruling the objection of these defendants to the following question propounded to witness J. G. Bennett, a witness on behalf of the United States:



Question: "What did he say to you about it?" and in permitting said question to be answered, and in admitting in evidence the answer of said witness. The substance of his testimony is that Mr. Lille, a salesman of the Superior Portland Cement Company, made a trip to Vancouver, Washington, and informed said witness that there was a meeting in San Francisco of the cement manufacturers of the companies including the Washington and California, about the beginning of 1915, and that there would be an adjustment of prices and that prices would be much higher and no deviations from said prices, and advised the witness to buy all the cement he thought he could handle. He bought accordingly at \$1.55 and shortly afterward had a wire that the price would be \$1.90 and with the usual dealer's commission.

### VIII.

The Court erred in overruling the objection of these defendants to a letter written by witness Bennett to J. C. Eden and the reply of Eden to the same upon the back of said letter, and in admitting said letter and answer in evidence and to be read to the jury. The letter and answer are marked "Plaintiff's Exhibit 41," and are as follows:

"Vancouver, Washington, April 30, 1915.

Mr. John C. Eden,  
Seattle, Washington.

Dear Sir:

We wrote your firm asking about the situation in regard to the bridge cement. We have answer saying

the rate question had not been settled yet and ending as follows:

‘If, however, coast cement should be used, we would in all probability have to put it through our Portland representative, viz., Balfour-Guthrie Company.

(Signed) Superior Portland Cement Company  
A. A. Sutherland.’

This does not worry us any as we have been told by both yourself and Mr. Barnes that if Superior cement is used it will be handled by us. However, it looks to us as if your Mr. Sutherland was trying to lose your remaining Vancouver customer.

Very likely it is a California proposition by this time anyway, as the writer saw a schooner unloading cement at the Pacific Bridge Company dock yesterday, but if there is anything doing for us we would like to know about it and not be kept in the dark.

Very truly yours,

BENNETT HDW. CO.,

J. G. Bennett.”

“May 5, 1915.

My Dear Bennett:

I have yours of the 30th in regard to cement for the Interstate Bridge. As you doubtless are aware, a contract was entered into between the Pacific Bridge Company and other Portland contractors with the International Portland Cement Company of Spokane, covering their entire requirements.

While it is possible that some of these contracts may be assigned to us, you, I think, will agree with me that inasmuch as you had nothing to do with the making of the contract between the Bridge Company and the International Company, you would not be entitled to any commission, particularly as we would doubtless have to pay the International something for making the assignment.

However, the fact is I am quite sure the Bridge Company, if any assignment is made, will insist upon being given either Standard or Santa Cruze cements, as the manufacturers of those brands dock practically all of their cement in the dock of the Pacific Bridge Company in Portland.

Under the circumstances, don't you agree with us that we could not afford to pay two commissions on an order which your firm had nothing to do with placing?

Yours truly,

JCE\*T. ....President."

## IX.

The Court erred in overruling the objection of these defendants to a letter from Bennett Hardware Company to J. C. Eden, dated April 30, 1915, and in admitting said letter in evidence, and to be read to the jury. This letter is marked "Plaintiff's Exhibit 41." The substance of the letter is that if the company's cement is to be used it would probably go through Balfour-Guthrie; that the writer saw cement being unloaded from a schooner at the Pacific Bridge dock and supposed it is a California proposition.

## X.

The Court erred in overruling the objection of defendants to letter dated March 24, 1914, written by Superior Portland Cement Company to F. T. Crowe & Company of Tacoma, quoting a reduction from \$1.60 to \$1.50 per bbl. at the factory when the cement was purchased by a state or county only, and in admitting said letter in evidence and to be read to the jury. This letter is marked "Plaintiff's Exhibit 49."

## XI.

The Court erred in overruling the objection of defendants to a letter written by the Superior Portland Cement Company dated June 1, 1914, to F. T. Crowe & Company of Tacoma, and in admitting said letter in evidence and to be read to the jury. The substance of this letter is quoting of prices to Olympic Hardware Company and Gray at Puyallup of \$1.20 f. o. b. mill instead of \$1.10, saying \$1.10 was the railway price and adding that the writer had some hope of getting price matters straightened and getting down to some basis so one might know what the price of cement really is. This exhibit is marked "Plaintiff's Exhibit 51."

## XII.

The Court erred in overruling the objection of these defendants to a letter written from Olympic Portland Cement Company signed Balfour-Guthrie to F. T. Crowe & Company, dated July 17, 1914, quoting price of \$1.90 net less 15c commission, sacks extra, and in admitting such letter in evidence and to be read to the jury. This letter is marked "Plaintiff's Exhibit 52."



## XIII.

The Court erred in overruling the objection of these defendants to a letter written by the Superior Portland Cement Company to F. T. Crowe & Company of Tacoma, quoting \$1.90 net f. o. b. Seattle, dated July 17, 1914, and in admitting said letter in evidence and to be read to the jury. This letter is marked "Plaintiff's Exhibit 54."

## XIV.

The Court erred in overruling the objection of these defendants to letter dated August 27, 1914, written by the Superior Portland Cement Company at Seattle to F. T. Crowe & Company at Tacoma, and in admitting this letter in evidence and to be read to the jury. This letter is marked "Plaintiff's Exhibit 56," and in substance refers to a telephone conversation and states that the Washington cement manufacturers had agreed between themselves that a certain order referred to in the letter should come to the Superior Portland Cement Company, stating that the Superior was putting in a bid of \$1.85½, Washington at \$1.97, and the Balfour-Guthrie & Company at \$1.90 and requested Crowe & Company not to bid at all on this contract, or if they did bid to bid slightly above the Superior Portland Cement Company.

## XV.

The Court erred in overruling the objection of these defendants to letter from Superior Portland Cement Company dated at Seattle December 31, 1914, to Crowe & Company of the same place, quoting price on cement effective January first \$1.90 net, no commission, and

a second letter bearing same date from Olympic Portland Cement Company to the same party to the same effect, and a further letter from the Olympic Portland Cement Company to the same party dated Seattle, January 4, 1915, acknowledging the letter of Crowe & Company, dated January 2, 1915, and stating that program properly outlined and that Olympic would sell in carload lots at \$1.90 to any consumer, leaving less than carload lots to dealers, and also a copy of letter from Crowe & Company to the Olympic, dated January 2nd, and also a letter from the Superior Portland Cement Company dated Seattle, January 12, 1915, to Crowe & Company at Tacoma, requesting Crowe & Company to confine their sales to Tacoma and the cement company would appoint other agents outside of Tacoma, and that both other factories were adopting the same policy, and also a letter from Superior Portland Cement Company dated Seattle, February 23, 1915, to said Crowe & Company, relating to the terms upon which its cement would be sold; and to admitting in evidence said letters and each of said letters and permitting the same and each of them to be read to the jury. Said letters form one exhibit marked "Plaintiff's Exhibit 57."

## XVI.

The Court erred in overruling the objection of these defendants to certain letters offered in evidence and to admitting said letters in evidence and to be read to the jury, which letters were offered as one exhibit and were as follows:

Letters from Superior Portland Cement Company dated Seattle, January 13, 1916, to Crowe & Company,

Tacoma, quoting price \$2.15 including sacks, f. o. b. Tacoma, allowance  $7\frac{1}{2}$ c per sack, also letter from Superior Portland Cement Company, dated Seattle, January 13, 1916, to Crowe & Company, Seattle, quoting \$2.30 f. o. b. Seattle, including sacks, sack allowance  $7\frac{1}{2}$ c; also letter from Washington Portland Cement Company, dated Seattle, January 12, 1916, to Crowe & Company, Seattle, quoting price effective same date \$2.30 f. o. b. Seattle, including sacks, sack allowance  $7\frac{1}{2}$ c; also letter Olympic Portland Cement Company, dated Seattle, January 11, 1916, to Crowe & Company, Seattle, quoting price \$2.30 f. o. b. Seattle, including sacks, sack allowance  $7\frac{1}{2}$ c.

Said letters are offered as one exhibit and marked "Plaintiff's Exhibit 58."

## XVII.

The Court erred in overruling the objection of these defendants to certain letters marked "Plaintiff's Exhibit 63," received by Galbraith Bacon & Company of Seattle, from Superior Portland Cement Company of Seattle, Washington, Portland Cement Company of Seattle, Olympic Portland Cement Company of Seattle, all dated February 10, 1914, and to admitting said letters in evidence and to be read to the jury. The substance of said letters was giving the same price and commission to all dealers.

## XVIII.

The Court erred in overruling the objection of these defendants to a letter identified by witness Eden dated April 18, 1916, written by Eden to W. H. George, and

a letter dated April 24, 1916, attached to the same, both offered in evidence together and marked "Plaintiff's Exhibit 74" and the admission of said letters in evidence and the reading of same to the jury. Said letters are as follows:

"April 18, 1916.

Dear Will:

Was mighty sorry on my visit to San Francisco last week not to have had time to have a few minutes talk with you, not only to speak about the Association, but to thank you personally for the wonderful party you gave us in San Francisco when I was there about two months ago.

Regarding the Association matters, I think your objection to any contribution in excess of  $\frac{1}{4}c$  per barrel was the same as my own, viz.: that too much of the  $\frac{3}{4}c$  voted at the Association meeting in New York last December was to be divided to National advertising and to other uses that were of very doubtful value in our particular section of the country. I sincerely hope that you will be in accord with all of those present at the meeting with Mr. Beck in San Francisco last week agreed to do. So far as the Northwest is concerned, I am positive that the spending of the 80% of the  $\frac{3}{4}c$  per barrel contribution will be a very good investment, and will enable us to reduce a good share of the direct expense we have been put to in each individual company attempting its promotion work.

I don't know whether you formed as favorable an impression of Mr. Beck as I did, but he certainly



strikes me as being the right man in the right place, and I hope that you will join the rest of us in lending him your heartiest cooperation.

With kindest regards and hoping that I may see you again in a short time, I am,

Yours truly,

Mr. W. H. George, 2 Market Street,  
San Francisco, California .”

“U. P. Compny, 1916 May 15 A. M. 7:20 Received	
President’s office Ret’d. . . . .	Portland Cement
1916, May 15, A. M. 8:32 Answered. . . Association	
Ref’d to. . . . .	May 15, 1916
Answ’d. . . . .	Noted BFA

# HENRY COWELL LIME AND CEMENT COMPANY

2 Market Street

San Francisco, California, April 24, 1916.

Attention of Mr. J. C. Eden.

Superior Portland Cement Company,  
Seattle, Washington.

My Dear Jack:

Replying to yours of April 18th, beg to advise that on April 20th I wired Mr. Beck as follows:

‘We will stay with the Association under new plan until October first, the date when the year that we joined for is up. Will then consider the matter again. Am afraid local competitors will not stop private promotion.’

At first I was not sure about Beck, but the more I saw him the more I liked him and am willing to

play the string out for the term of our enlistment of one year from October 1, 1915, to October 1, 1916.

Altogether I am free to confess that I am not quite sure as to the advisability of all this. I feel as though a company like our own could probably to better advantage as far as its own interests were concerned, do its own promotion work, but I do realize that this looks like a selfish position, because if the others were all in the Association, promoting the Association work, we of course get some measure of benefit. This, at this time, is the real reason that keeps our company in the Association, with the further hope that during the balance of the time that we are in, that things will develop so that all hands will see the advisability of a Coast Association, as I thoroughly believe in this.

I hope before long to have an opportunity to discuss all of this personally with you.

Yours very truly,  
W. H. GEORGE, Secretary."

## XIX.

The Court erred in overruling the objection of these defendants to the introduction of certain papers identified by the witness Eden marked "Plaintiff's Exhibit 75," and to admitting said papers in evidence and to be read to the jury. These papers consist of telegrams passing between Muhs and Eden, between Eden and Coats, and between Woodworth, Vice-president of the Northern Pacific Railroad Company, and said Eden, all of said papers relating to the proposed freight rate upon cement from the International Portland Cement

Company to the City of Portland to enable said cement company to deliver its cement to Portland to fulfill the contract of Pacific Bridge Company, and show the effort made by the Washington companies and representatives of the Superior, the Washington and Olympic Cement Companies to prevent this rate being put in.

## XX.

The Court erred in overruling the objection of these defendants to certain papers identified by witness Eden and marked "Plaintiff's Exhibit 76," and to admitting said papers in evidence and to be read to the jury, said papers consisting of certain correspondence passing between Aman Moore and J. C. Eden dated March 25, 1916, and relating to the manner of supervising paving work and contain the statement of Eden to the effect that inasmuch as his company probably would not participate in the cement business in Oregon, they could not see their way clear to assume any of the expense of promotion in Oregon.

## XXI.

The Court erred in sustaining the objection of the United States to the introduction in evidence of certain papers identified by the witness Eden. These papers consist of publications of the Portland Cement Association published and circulated by cement companies and relating to the promotion of the use of cement and to educate the public in regard thereto.

## XXII.

The Court erred in overruling the objection of these

defendants to certain letter identified by witness W. P. Cameron, to-wit, letter dated August 4, 1916, marked "Plaintiff's Exhibit 78," and certain other papers offered therewith marked "Plaintiff's Exhibit 79," and in admitting said papers in evidence and to be read to the jury. These letters consist of correspondence between Foster & Company of Hoquiam and the Washington Portland Cement Company, Olympic Portland Cement Company and the Superior Portland Cement Company of Seattle, dated in August and September, 1916. The substance of these letters was that Foster & Company were acting as dealers and distributors of all three Washington companies in Hoquiam and that vicinity, giving each of said companies a fair share of the tonnage and putting all three companies upon the same footing.

### XXIII.

The Court erred in overruling the objection of these defendants to a carbon copy of a letter written by Tyler Henshaw to R. P. Butchart, marked "Plaintiff's Exhibit 89," and in admitting said letter in evidence to be read to the jury. Said letter is as follows:

"September 24, 1914.

Mr. R. P. Butchart,

Care Vancouver Portland Cement Company,  
Victoria, B. C.

My Dear Mr. Butchart:

I have been trying very hard to find an opportunity to run up to Victoria to see you for a day, but have found it utterly impossible this time. I



wanted to talk to you about two things—both are of a very intimate nature, but on account of the very warm feeling that I have for you, and which I trust is to some extent reciprocated, I would not hesitate to talk or write you, but of course I would much prefer to talk to you.

The first is in regard to Carl Leonardt. He is a very peculiar man. He has off and on been trying to start a cement plant somewhere in southern California. Why, I don't understand, for he certainly knows the conditions as well as any man. Southern California is as much overproduced as any other section of the coast. After many abortive efforts to find a property, he finally located one apparently and seemed to have started in seriously to interest capital in it. This property is located out on Cajon Pass on the Santa Fe Railroad. It is not particularly well located, being four or five miles from a railroad, in a desert section of the mountains where it would be inevitably hard to keep men at work. He cannot produce his cement ever anywhere nearly as cheap as we are producing it, although we will concede him just as good a quality. Now he is attempting to go into an already overloaded market. I don't understand some people in this way, however I want to make my story as short as possible.

He came to San Francisco about two months ago and called in to see me. I asked him if he intended to put up a plant on his property, and he said yes. Then I went over the matter very friendly, kindly way with him; told him what the situation was; how terribly overburdened that section was with

cement; how the mills already there would have to wait ten or fifteen years until the demand grew up to the present output. All of which seemed to make little impression, but finally I said to him: Now, see here, Mr. Leonardt, we have been very loyal friends of yours; have given you your cement under the market right along; we have protected you in your business, and being a cement man as you are, you are doing this with your eyes wide open, therefore, it is only fair for me to say to you this; that we will not stand patiently by and see you put up another mill and add more trouble to our market. You have an indubitable right to put up a mill, but we have just as indubitable right to protect our market, and the moment you put your cement on the market we propose to put the price down where neither you nor ourselves can make any money, and we will continue it there.

Now, Mr. Butchart, I don't bluff. The situation there is so bad now with Colton and ourselves and the little Gordon state mill, that if Leonardt comes in with a mill we might just as well start in and clean up the the situation one time as another and let the man with the longest pole take the persimmon.

Leonardt thought this over and finally intimated he thought I was about right in my attitude, and told me if I would come down in the course of five or six weeks we would go down to the property and sell it out to me. No price was agreed upon, but he stated positively he would do so. I went down south, telephoned him, and he came over to Riverside. We took a machine and went out there and after look-

ing over the property I told him I was ready to buy it and to name his price and terms. He then began to shy and finally told me he would be up to San Francisco in about two weeks and would then settle the matter with me, which could only mean he would sell it to me. I tried to urge him to close up then, but he would not do so, but he again promised that within two weeks he would be up and sell it to me. I even said to him, you mean, you will sell this property outright to me, and he said, yes.

Now he is keeping out of my way. There is no question in my mind that he is going to try to interest capital. I don't think anybody would be foolish enough under the circumstances to go into the proposition with him. Freights are against him and he can't manufacture as cheaply as we can. My honest belief is that we can make \$300,000.00 a year and keep him out of the market, or make him sell below cost. I may be wrong, but I firmly believe it and propose to tackle it anyway if he bobs up.

Now, without betraying any confidence as far as Mr. Leonardt is concerned, can you tell me whether he said anything to you about his plans down here? If so, what they were and whether you inferred he was seriously contemplating putting up a mill. I know you will tell me whatever you can properly, and I don't ask of you anything that is not proper for you to tell me, but whatever you do tell me will not go, under any circumstances, beyond my brother and myself.

Now, secondly, this must be considered by you as strictly confidential, but I am writing you per-

sonally so that you will have a full knowledge of the situation here in Oregon, and I am writing you only from that standpoint and because of my warm personal friendship.

I have bought a property here which I have been testing for something like a year. It is a property which in combination with our clinker, makes a cement of a remarkably high type. In fact, Mr. Butchart, in many ways exceeds regular Portland cement. This property will enable me to put a cement on the market here at a cost from 65c to 75c a barrel, not exceeding the latter price, and I think we can do it after a year's run, under the former price. Mind you, I am only talking of prospects. We are testing the material carefully in all directions; putting it into walls, putting it into highways; testing it under most unfavorable conditions, and so far it has shown up wonderfully. I am perfectly candid, and always with you my cards are never anything but 'face up on the table.' I am not quite through with my experiments with this cement, but will have finished them within the next three or four months, and will have it in practical use unknown to anyone except a few engineers. Within the next three or four months, I will have had over a year's full test upon the material, all compression and tension tests, etc., and will be in a position to know exactly what the material is. I shall put it on the market in Portland at not over, I think, \$1.25 a barrel, and some of it for mass work, harder work, street work, and the like, will be sold for probably \$1.00 to \$1.10 in this market.



Now, I have heard nothing further for many, many months about the prospects of this Portland Cement Company here. I have understood you are not interested in this company here any further, although my information, naturally was not authentic, but anyway I want you to know privately and confidentially what my prospects are here, so that at least if you were contemplating any movement in regard to this cement plant, you would have full knowledge for your own personal benefit of what my prospects were. The whole plant that I will put up will not cost over \$100,000.00 and my estimates already made and carefully checked, do not exceed \$75,000 for a plant to produce safely 400,000 barrels per annum. I will say this further, that I do not expect to put on the market over 200,000 to 300,000 per annum anyway, but *if* this cement turns out as every test shows it to, covering a period of eight months or more, and *if* I can produce it with as little original investment, and *if* this little affair starts in without a dollar of indebtedness of any sort, and *if* I can produce it at the price I have stated or lower, it would be a serious competitor for any cement mill to face.

If there is anything further you would particularly like to know about it, write me any question and I will gladly answer you fully.

Regretting exceedingly that I did not find the time to run up and discuss these matters with you, and with warmest personal regards, I beg to remain,

Yours very sincerely.

P. S. In reading this letter over, while I have written it only from the friendliest motives, fear it may sound to you in the nature of a possible menace. I hope you know me well enough to believe that nothing of the kind is intended. The reason that I am writing is feeling that as I have a warm personal friendship for you, it seemed only justice to that friendship to tell you confidently the prospects that were before me in this market in the cement line. I can see no reason why there should not be room for us both, and as indicated I do not intend to come in here and try to supply the entire market. In fact, I know perfectly well that it would be impossible for me to do so, but at the same time I hope you understand that I am only telling you of these prospects (of course they are as yet only prospects) that might to some extent militate against any program you had set out in this market, if you are still connected with the Portland Cement Company here. You know that you and I could work side by side in this market without any trouble. I feared you might, if I said nothing about this before hand, feel that I had failed in the matter of friendship to you in not letting you know confidentially and beforehand."

#### XXIV.

The Court erred in sustaining the objection of the United States to a certain letter identified by witness Aman Moore written by Wirt Minor to Aman Moore, dated July 25, 1916, which said letter is as follows:

"July 25, 1916.

Mr. Aman Moore,  
Care Mr. Coy Burnett,  
Lewis Building, Portland, Oregon.

Dear Sir:

I am in receipt of communications dated July 24th addressed to the Directors of Oregon Portland Cement Company and signed by yourself, in which you demand that an immediate directors' meeting be called for the purpose of obtaining various data from the parties named; that is to say, Mr. R. P. Butchart, Mr. Newlands, Mr. Macdonald, Mr. Clark M. Moore, and Mr. Ballard to the end that suit may be instituted under the Federal 'Treble Damage Statutes' for the damages sustained by the company through alleged illegal agreement on the part of the gentlemen above named.

This matter was brought before the Board informally at its last meeting and you were requested by myself to state what action you desired to take, but for some reason you did not see fit to do anything whatever.

The by-laws of the corporation, article IV, section 4, provide that—

'Special meetings of the board of directors shall be called by the Secretary when he is requested so to do by the president, on three days' notice to each director.'

Special meetings shall be called in like manner on request of a majority of the members of the board. You are aware that the president of the cor-

poration is now absent. You yourself are one of its vice-presidents. Section 2 of article VI of the by-laws provides that—

‘In the event of the absence of the president, one of the vice-presidents shall exercise the powers and perform the duties of the president during such absence, subject to the advice and control of the board or of the executive committee.’

You, therefore, have it in your power to call this meeting and I shall be pleased to have you do so. If you are not willing to take the responsibility of calling the meeting, I am perfectly willing to be one of a majority of the board to call such meeting. It will require this call to be signed by five of the directors; Mr. Butchart is away; Mr. Bates has tendered his resignation, but it has not been accepted as yet at your instance; Mr. Wilson has tendered his resignation, but the same has not yet been accepted; and Mr. Johnson is away. It will therefore be necessary for you to be one of the five directors to join in the call.

If you desire to have the meeting called, as suggested, and will come to my office, I shall take pleasure in preparing the call and in signing it. I do not know, however, whether Mr. Butchart and Mr. Newlands, who are charged by you with malfeasance in office, will consent to sign such call or not; if not, you will have to procure the signatures of Messrs. Wilson and Bates.

As Mr. Butchart and other directors are charged with malfeasance in office, I think it will be but rea-



sonable that the meeting when called shall be called for such time as to give these parties an opportunity to attend and respond in person.

Yours very truly,

WIRT MINOR."

## XXV.

The Court erred in sustaining the objection of the United States to the introduction in evidence of a letter offered by defendants written by Wirt Minor to Aman Moore, dated August 29, 1916, and in refusing said letter to be introduced in evidence. The letter is as follows:

"August 29, 1916.

Mr. Aman Moore,  
Oswego, Oregon.

Dear Sir:

As one of the directors of the Oregon Portland Cement Company and as one of the general attorneys or counsel, I hereby demand that you afford me an opportunity to investigate the facts upon which the suit brought by you in the name of the Oregon Portland Cement Company is based. In connection with this demand I also demand that you afford me an opportunity to examine all the evidence from which these facts have been deduced or inferred.

I also desire you to advise me by what authority this action was commenced, for as you are aware it was commenced without consulting the Board of Directors. I should be pleased to confer with your

attorneys at any time regarding the matter and to examine the evidence in their offices and to this end I am sending a copy of this letter to each of your attorneys of record.

I will add that I have been requested to take this step by several of the directors of the corporation.

Yours truly,

WIRT MINOR."

WM/MH

## XXVI.

The Court erred in overruling and denying the motion of these defendants to instruct the jury to disregard all correspondence between Aman Moore and defendant Butchart prior to the time Clark M. Moore was elected sales manager in considering this case with regard to the guilt or innocence of Clark M. Moore, and that said correspondence should not be considered in arriving at the guilt or innocence of Clark M. Moore, and particularly to the statement made by the district court as follows:

"Of course any statement or admissions Mr. Butchart made before Mr. Moore became connected with this company would not be competent as admission of guilt against Clark M. Moore, but would be competent for the purpose of showing the status of the company and the condition at that time, and the admission made against the interest of Mr. Butchart."

## XXVII.

The Court erred in overruling the objection of these defendants to certain correspondence passing between

Carl Leonardt and the witness W. H. George, consisting of letter from George to Leonardt dated Feb. 1, 1916, and the answer thereto dated Feb. 7, 1916, and the reply to said letter dated Feb. 8, 1916, all of which were offered as one exhibit marked "Plaintiff's Exhibit 105", and to the admission of said letters and each of them in evidence, and to the reading of said letters to the jury. These letters are as follows:

“(In pencil)  
LB 10/13/20.

(letter head)

## HENRY COWELL LIME AND CEMENT CO.,

2 Market Street,  
San Francisco,

February 1, 1916.

(to)

Mr. Carl Leonardt,  
c/o Southwestern Portland Cement,  
H. W. Hellman Bldg., Los Angeles.

My Dear Mr. Leonardt:—

I arrived home safely and want to thank you for your very kind and courteous treatment when I was at Los Angeles.

Please remember me kindly to Mr. Merrill and to Mr. Schirm.

I hope that by this time the get-together talk which I made it my particular business to give to all of those who are in the lime business, is bearing fruit and that the conditions are better and settled.

I congratulate you on the lay-out and character

of your new cement plant and trust that when she begins operation you will find a ready market for a reasonable output at the highest price and under regular terms and conditions.

Regarding regular terms and conditions; I enclose you herewith a little suggestion which I trust will be interesting. We have found it to work out to the best possible advantage here.

I hope to be able to write you in a few days that the allowance for returned empty sacks has been changed to  $7\frac{1}{2}$  cents.

Again thanking you and conveying to you my best personal regards, I remain,

Yours very truly,

W. H. GEORGE."

WHG-W

"Monday, February 7, 1916  
(in pencil)

LB 10/13/20

Mr. W. E. George, Sec'y.

Henry Cowell Lime & Cement Company,  
2 Market Street, San Francisco, California.

My dear George:

I received your letter of February 1st and thank you very much for the contents. That is the proper spirit! I refer to where you mention regarding our new cement plant that you 'trust when it begins operations we will find a ready market for a reasonable output,' etc. Some of our cement manufacturers seem to think that no one else has a right to



engage in the same business and manufacture and sell cement, which is entirely wrong as this is a free country and every man has a right to make an honest living and any combine to ruin a competitor by misrepresentation and crookedness is wrong, which soon or late they will find out to their sorrow if they do not change their tactics.

You know a good neighbor cannot live in peace if the bad neighbor does not want him to. The Portland plant as well as the Victorville plant wants to live in peace, but no man has the right to say that these plants have no right to manufacture or sell cement. These plants only want their rights which they hope to obtain by peaceful and harmonious methods. Of course you know what it means to a large manufacturer as compared to one that has less capacity, when it comes to price cutting. I leave it to you to say who can stand it the longest.

I was in San Francisco last Saturday, leaving the same evening. I talked with your office, but you were at the factory. Mr. Butchart was with me and no doubt will write you from Del Monte. You can see him at any time and go into details with him, and should something of importance come up I will be willing to go to San Francisco at any time.

Wishing you success, I am,

Yours very truly,

---

President."

“HENRY COWELL LIME AND  
CEMENT CO.

2 Market Street.

San Francisco, February 8, 1916.

(In pencil)

LB 10/13/20

Carl Leonardt, Esq.,  
Pres. Southwestern Portland Cement Company,  
710 H. W. Hellman Building, Los Angeles.

Dear Mr. Leonardt:—

I am just in receipt of yours of February 7th and hasten to reply. I am willing to admit the truth of every word that you say and you know how I feel about these matters. I feel that that is exactly the way they should be carried out.

Undoubtedly by this time you have my other letter written from the plant on last Saturday.

At this writing I am at a loss to know where Mr. Butchart is. My understanding was that he was going to Los Angeles, probably with you from San Francisco, altho my first impression was that he was going direct to Los Angeles. I have written him in your care at Los Angeles, and am now awaiting results as to whether it is best for me to go to Los Angeles, to see him at Del Monte when he goes there, or to await his arrival again at San Francisco.

When in Los Angeles I outlined to you what I wanted to say to Mr. Butchart, and I do hope that it will be agreeable and work to a satisfactory end. I shall be very glad indeed to advise you of all results.

Thanking you indeed for your many courtesies,  
I remain,

Yours very truly,

W. H. GEORGE,

WHG-W

Secretary."

## XXVIII.

The Court erred in overruling the objection of these defendants to the questions addressed to the witness W. D. Skinner, Traffic Manager of the Spokane, Portland & Seattle Railway, in regard to putting in a special rate on cement from Spokane to Portland in 1915 in order to get the haul on the cement for the Interstate Bridge, and to admitting said evidence or any thereof. Such evidence was in substance that the witness was Traffic Manager of the Spokane, Portland & Seattle Railway, sometimes called the North Bank Road; that prior to March 1, 1915, the rate per hundred pounds on cement from Spokane to Portland was 25c; that in the hopes of securing the cement for the Interstate Bridge, the witness undertook to make a rate of 13½c per hundred pounds from Irwin, a point near Spokane, to Portland. That as such Traffic Manager the witness had a right to make such rate; that he delivered a slip to the cement plant at Irwin stating that his road would publish a rate of 13½c on cement in carload lots from Irwin to Vancouver, Washington, or Portland if the Irwin plant secured a contract for the Interstate Bridge cement. That he was afterwards advised the Spokane plant had secured the contract; that objections were made by Eden and Coats of the Washington Cement plants, and the other cement plants to putting in such rate, and the mat-

ter was held in abeyance; that an adjustment was made between the cement companies, and the rate was not put into effect.

## XXIX.

The Court erred in overruling the objection of these defendants to the introduction in evidence of a certain paper marked "Plaintiff's Exhibit 151", and to admitting said paper in evidence and to be read to the jury. Said paper is as follows:

"S. P. & S. will publish rate 13 $\frac{1}{2}$ c on cement c/1 from Irwin, Washington, to Vancouver, Washington, and Portland, Oregon, if Irwin plant secured contract for Interstate Bridge cement. W. D. Skinner, F. T. M., Portland, Oregon, 3/6/15."

## XXX.

The Court erred in overruling the objection of these defendants to a certain paper offered in evidence by the United States marked "Plaintiff's Exhibit 152", and to admitting said paper in evidence and to be read to the Jury. This is a letter from the International Portland Cement Company to W. D. Skinner, in which they state:

"Have closed contract to furnish that cement, and confirming the writer's talk with you on the 6th inst., please see that the rate is published with the least possible delay."

## XXXI.

The Court erred in overruling the objection of these defendants to certain papers identified by the witness



W. D. Skinner marked "Plaintiff's Exhibit 153", and in admitting said papers in evidence and to be read to the jury. Said papers were offered as one paper, and they consist of telegram of March 11, 1915, from the International Portland Cement Company to Skinner, as follows:

"Have not received copy of tariff covering rate Vancouver and Portland. Acting upon agreement we have contracted to furnish approximately 10,000 tons. Must have tariff effective at earliest possible date."

and the reply of said Skinner thereto, as follows:

"My hands tied temporarily as to publication of tariff. Have discussed situation fully with Pacific Bridge Company who are satisfied to leave matter in my hands for few days, when hope be able advise definitely."

### XXXII.

The Court erred in sustaining the objection of the United States to a question propounded to witness F. R. Muhs, as follows:

"Now give the jury some idea of how profitable it has been, say how much money in proportion to the capital your mills have made."

The witness had testified that the companies with which he was identified, the Santa Cruz Portland Cement Company, and the Standard Portland Cement Company after 1908 had made money, and the evidence sought to be elicited was for the purpose of showing

that the amount of money made had been small as compared with the capital invested.

### XXXIII.

The Court erred in sustaining the objection of the United States to testimony tendered by defendants through the witness L. C. Newlands as to the reasonable cost of putting up the mill of the Oregon Portland Cement Company in 1915, and 1916, which evidence was offered for the purpose of showing the cost of the manufactured product, the defendants claiming that the cost or value of the factory is a proper element to take into consideration in ascertaining the cost of the manufactured product.

### XXXIV.

The Court erred in overruling the objection of these defendants to the following question propounded to the witness H. S. McCracken:

“At what price did you sell cement at that time?” and erred in allowing said question to be answered. The witness McCracken was a dealer in cement in the City of Portland; he had testified in regard to prices which he paid for cement to the Oregon Portland Cement Company and other cement manufacturers, and the testimony admitted was to the effect that he sold cement at \$2.30 because he could get no more for his cement than other companies could get; that the California companies were selling cement in Portland through their selling agencies, and were selling to the public at \$2.30.

## XXXV.

The Court erred in sustaining the objection of the United States to admission in evidence of a telegram offered by the defendants addressed to R. P. Butchart and signed by Charles Boettcher, E. Possett and R. J. Morse, dated July 27, 1916. This telegram had been identified by the witness Wirt Minor as a telegram shown to him or read to him by Aman Moore at a meeting held in his office by Aman Moore, Clark M. Moore, representing Mr. Boettcher, and Harry Ross, representing Mr. Butchart. The telegram is as follows:

“July 27, 1916.

R. P. Butchart,  
Vanderbilt Hotel,  
New York City.

We have inspected your plant here and have no criticisms to make of Mr. Newlands' management but on account of notoriety of lawsuit and damage to company would recommend Aman Moore be placed in charge of plant and quarries leaving sales as at present and that you wire Mr. Newlands to resign and permit the election of some new member to Board of Directors. We have talked to number stockholders here and they are unanimous; that settlement should be made with Moore to prevent notoriety and damage of his suit. Bank also refuses to extend loan unless assured suit will not be brought. We have looked over figures in office and find we must have at once fifty thousand dollars more to meet pay rolls and bills. Wilcox will loan part if Board is reorganized. If change meets with your approval

will you kindly wire Teal and Minor attorneys and stockholders to call meeting and reorganize board and appoint Moore superintendent.

C. BOETTCHER

R. J. MORSE

E. POSSETT."

and erred in excluding said testimony.

### XXXVI.

The Court erred in sustaining the objection of the United States to the admission in evidence of a telegram from the witness Clark M. Moore to Grant Fee, and a letter from Grant Fee to the witness. These papers were marked defendant's identification 112 and 113 respectively, and were excluded by the ruling of the Court. In substance they relate to the proposed visit of Clark M. Moore to San Francisco in August, 1916, and to a meeting which he wished to have with Grant Fee at that time with a view to selling him Oregon Portland cement for the erection of the Portland post office. The witness had testified in regard to the purpose for which he had gone to California and among other things he went there to see Mr. Fee and to sell him, if possible, the cement for the Portland post office, for which said Fee had obtained a contract.

### XXXVII.

The Court erred in sustaining the objection of the United States to certain telegrams offered in evidence by defendants' identifications 114 and 115, and to the exclusion of said telegrams from the evidence by the



ruling of the Court. The witness Clark M. Moore had testified regarding a visit he had made in August, 1916, to San Francisco, and among other objects of that visit was to see a Mr. Hiltz who was representing the Portland Cement Association on the Pacific Coast with a view of having him come to Portland and arrange for an inspector on some road work, which was being done to see that the work should be done according to specifications, and in connection therewith the defendants offered certain telegrams as aforesaid for the purpose of showing this to be, among other things, his object in going to San Francisco.

### XXXVIII.

The Court erred in that part of its charge to the jury, as follows:

“Now the second count of the indictment, as I have already said to you, charges the defendants with monopolizing the trade or commerce between the states, in violation of section two of the Act, which provided that all persons who shall monopolize or attempt to monopolize or combine with any person or persons to monopolize any part of the trade or commerce among the several states, shall be guilty of a crime. To constitute the offense of monopoly, under the Act, it is necessary to acquire exclusive right to such commerce by means which will prevent others from engaging therein. The popular meaning of monopoly is the sole power of dealing in some particular commodity, in some particular market or place, or carrying on some par-

ticular business. Anything less than this is not a monopoly. The size of a business is not in itself a violation of this law. The Act denounced by the statute is the certain and necessary prevention of other persons engaging in such business and thereby stifling or preventing competition. The evil against which the statute is directed is not the enlargement of the trade of one person, but the destruction of the trade of others, in some commodity. It is the suppression of competition by the unification of interest or management, or by agreement or concerted action. It signifies the combining or bringing together into the hands of one person, or group of persons, the control, or the power of control, over a particular business or employment, so that competition may be suppressed by preventing others from engaging therein."

### XXXIX.

The Court erred in that part of its charge to the Jury relating to the Portland Cement Company prior to the organization of the Oregon Portland Cement Company, as follows:

"There have been introduced in evidence some letters passing between Mr. Butchart and Mr. Aman Moore at a time prior to the date the Oregon corporation began marketing its product, and prior to the time that Clark Moore became connected with the concern. \* \* \* They are, however, evidence against Mr. Butchart, and may be considered by you for the purpose of showing the conditions as they

existed at the time Clark Moore became Sales Manager of the Oregon Company.”

## XL.

The Court erred in that part of its charge to the Jury, as follows:

“Certain letters have also been introduced in evidence, written by Aman Moore and addressed to Mr. Butchart, which contain statements or suggestions concerning fixing prices or allotment of territory, by agreement with other manufacturers. The statements or suggestions contained in these letters are not evidence against Mr. Butchart, and do not tend to prove the connection of Butchart with any such agreement or combination, unless it appears that he acquiesced in the suggestion, or acted thereon, or combined with other manufacturers in accordance with the statements or suggestions so made by Moore.

“Various letters have also been introduced written by officials, or associates of officials of cement manufacturers in Washington and California, to defendants Clark Moore and Butchart. Any statements, suggestions, or requests contained in any such letters are not to be taken or deemed as evidence of the guilt or innocence of the defendants Moore or Butchart, unless Butchart or Moore acquiesced in such statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions made or contained in the letters, but these letters are a part

of the evidence, showing the relation existing between these people, and their conduct and actions, and for that purpose are competent and should be given such weight as you gentlemen may think they are entitled to."

and the Court erred particularly in that portion of the charge, as follows:

"\* \* \* but these letters are a part of the evidence, showing the relation existing between these people, and their conduct and actions, and for that purpose are competent and should be given such weight as you gentlemen may think they are entitled to."

#### XLI.

The Court erred in that part of its charge to the Jury, as follows:

"There has also been some testimony to the effect that charges of illegal combination were made to the directors of the Oregon Company in June, 1916, and perhaps later. These charges culminated, as you will recall, in certain suits or actions brought by Aman Moore against certain officers or directors of the Oregon Company, and also resulted in the appointment of a stockholders' committee, to investigate these charges. The opinion of this committee, or of any director, as to the truth of the charges, is quite immaterial and should be disregarded by you. The fact that such charges were made, however, may be considered by you in connection with the manner of conducting the business



of the Company, and you may compare what was done before and after the charges were made and these suits filed, if there was any change in the manner of doing business, in passing upon the guilt or innocence of the defendants; and it is for you to determine whether sales, if any, made in Washington, after the making of these charges, were designed or intended for the purpose of evading such charges.”

and particularly the Court error in that part of said charge as follows:

“\* \* \* The fact that such charges were made, however, may be considered by you in connection with the manner of conducting the business of the Company, and you may compare what was done before and after the charges were made and these suits filed, if there was any change in the manner of doing business, in passing upon the guilt or innocence of the defendants; and it is for you to determine whether sales, if any, made in Washington, after the making of these charges, were designed or intended for the purpose of evading such charges.”

## XLII.

The Court erred in that part of its charge to the July, as follows:

“Mr. Butchart, however, while upon the stand, testified that he did not make certain statements attributed to him by Aman Moore, but said nothing about the letters written by him to Aman Moore,

nor did he say anything about the meeting in San Francisco, referred to in these letters, nor offer any explanation of the letters, or any other statements contained therein. Now this was his privilege, and being a defendant he could not be required to say more if he did not desire to do so, nor could he be cross-examined as to matters not covered by the direct testimony, but upon passing upon the evidence in this case for the purpose of finding the facts, you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted, in that case, to comment unfavorably upon the defendant's silence. But where a defendant elects to come upon the witness stand and testify he then subjects himself to the same rulings that apply to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the circumstances, in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence, if there is any against him, he would have done so."

and the Court erred particularly in that part of the charges, as follows:

“\* \* \* Nor did he say anything about the meeting in San Francisco referred to in these letters.”

### XLIII.

The Court erred in that part of its charge to the Jury, wherein the Trial Court instructed the Jury in regard to certain letters written by Aman Moore to R. P. Butchart, and which contain statements or suggestions concerning fixing prices by allotting territory by agreement with other manufacturers, and particularly to that part of the charge wherein the Court submitted to the Jury said letters as evidence against the defendant R. P. Butchart, as follows, if

“it appears that he acquiesced in the suggestions, or acted thereon, or combined with other manufacturers in accordance with the statements or suggestions.”

### XLIV.

The Court erred in refusing to charge the Jury as requested by defendants in writing, as follows:

“Portland cement is a mineral product. Certain earths or minerals, principally lime and clay, are mixed in specific proportions, fused by intense heat into a new uniform composition known as klinker and this klinker ground to an impalpable powder with certain ingredients added, is the Portland cement of commerce. It is sold by barrels, for in the earlier stages of the industry the containers were always wooden barrels. The net content of such barrel was

376 pounds of cement. In the latter development of the industry the practice obtained and now rules upon the Pacific Coast of packing the cement in sacks, each sack weighing 94 pounds. Thus four of these sacks equal one barrel, but the sales are still in terms of barrels, and mill capacity is spoken of in terms of barrels. When of a given mill it is said that it has a capacity of 1000 barrels, it means that working to capacity that mill can output 1000 barrels a day.

“In the sales of cement on the Pacific Coast provision is usually made to compensate the ultimate purchaser for a return of sacks in good condition. In this regard the usual allowance is from  $7\frac{1}{2}$  to 10 cents per sack.

“To the successful manufacturer of cement a factory requires its limestone quarry, and its clay deposit; the other ingredients, such as gypsum, etc., usually being purchased abroad. The rough materials brought to the mill are subjected to a drying heat, to grinding to a given degree of fineness, to admixture in due proportions, and then to an intense heat in kilns. The product of this is known as klinker. The klinker marks the termination of the first stage in the production of cement. It may be heaped in piles and exposed to the air and improves rather than deteriorates by this from the beneficial chemical changes which result from the action of the oxygen in eliminating the free lime which the klinker may contain. In the second process of manufacture the klinker is ground to an extreme fineness,



thoroughly mixed with the minor ingredients and transported to the warehouse or packing house as the completed product ready for the market. The principal ingredients being furnished by the earth in a state of nature the cost of these in their primitive state is not as a rule great. That cost is principally composed of the investment in mill machinery and of labor. The mill machinery is complicated and expensive. Dryers, grinders, kilns, conveyors, etc. Much heat being necessary, the fuel item is an extremely heavy one. Owing to the nature of the process by which cement is made the necessary application of intense heat, the kilns and other machinery are subject to rapid deterioration in use. The life of a cement mill in operation is ten years, or in other words, the necessary renewals and replacements have in ten years substituted a completely new set of machinery for the original."

#### XLV.

The Court erred in refusing to charge the Jury as requested by defendants, as follows:

"Portland cement is an article of commerce and under the law must be tested before it is placed upon the market and any brand of Portland cement which stands these tests and fulfils the requirements of the law can be used in all work in which Portland cement is used."

#### XLVI.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

“Every manufacturer has the right to ascertain in any legitimate way the price at which goods manufactured by others and competing with the product of his mills are sold. Competing manufacturers issuing price lists from time to time may legally exchange their respective price lists. Competing manufacturers may lawfully advise one another of the territory in which their manufactured products are marketed, and may lawfully advise one another of the prices at which their respective products are put upon the market. Giving and receiving such information is not forbidden by law.”

#### XLVII.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

“It is therefore a natural conclusion that the mere fact that a manufacturer of Portland cement in the State of California, Oregon, and Washington may have issued from time to time price lists or circulars stating the price at which and terms on which the product of his factory would be sold, and that a similar price list or circular letter may have been issued by some or by all other manufacturers of Portland cement in said states and that in all of said price lists or circular letters issued at or about the same time the price of Portland cement is the same and the terms of sale the same, will not in itself constitute a violation of the statute or be in contravention of the law nor can you find the defendants guilty upon evidence of this character alone even

though you should find that every manufacturer sold his product at the same price and upon the same terms. To constitute a violation of the law there must also be evidence which satisfies your minds beyond a reasonable doubt that such prices or terms were fixed by agreement or combination between the several manufacturers and that defendants Butchart and Moore were parties to such agreement or combination."

#### XLVIII.

The Court erred in refusing to charge the Jury as requested by these defendants in writing as follows:

"Every manufacturer of Portland cement has the legal right to determine from time to time the territory in which the parties to whom, the prices at which, and the manner in which the product of his factory shall be sold. He may also issue price lists or circulars and employ any other method which he may desire to advertise or sell the product of his mill. Such conduct is not a violation of the statute under which the defendants are indicted or in contravention of any law."

#### XLIX.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"Every commodity such as Portland cement is under normal business conditions put upon the market for sale and sold and the average price at which

such commodity is sold is commonly designated as the market or market price. Under normal conditions Portland cement is sold in this manner and the price at which it is so sold from time to time would constitute the market price at the time. Such market price naturally changes from time to time due to cost of manufacture, cost of transportation, supply and demand, and to other causes too numerous to enumerate. Each sale affects and therefore each manufacturer in offering and selling his factory's output necessarily contributes to making the market price, and of course such action on his part is not in violation of law. It is only the making or fixing of the market price by agreement, combination or conspiracy with other manufacturers which is prohibited, so that if you are not satisfied by the evidence beyond a reasonable doubt that either of the defendants Butchart and Moore, as officers or agents of Oregon Portland Cement Company did agree or combine or conspire with other manufacturers of Portland cement in the states above mentioned to make or fix the market price for Portland cement, or agree or combine or conspire with other manufacturers to limit the territory in which Oregon Portland Cement Company should sell its products or agree or combine or conspire with other manufacturers to limit the territory or fix the price at which the products of the mill of some other manufacturers should be sold, you must return a verdict of not guilty."



## L.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

“I have permitted the Government to introduce evidence tending to show that in 1915 the Spokane, Portland & Seattle Railway Company promised to reduce its freight charges upon Portland cement from Irwin, Washington, to Portland, Oregon, and Vancouver, Washington, and that the Western Washington Cement Manufacturers and some of the Northern California Cement Manufacturers combined to defeat such proposed change in the freight rate and that they succeeded in defeating the same by promising to supply cement from their mills for the Interstate Bridge at the price at which cement for this purpose was offered by the Irwin plant if the rate had been installed. Such action on the part of the Western Washington and California manufacturers, if proven to your satisfaction, would not constitute a violation of the statute on which this indictment is based.”

## LI.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

“There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the anti-trust act was passed, a definite legal signification. Not every combination in restraint of competition is in restraint of trade. But

it does not necessarily follow that restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish interstate trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition with regard to their purpose or direct effect to restrain 'trade or commerce among the several states.' To what extent the anti-trust act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated, and it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

"The language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. Restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade."

### LII.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"Even if you are satisfied from the evidence that

there was an agreement or conspiracy or combination or a concert of action among the manufacturers of Portland cement in the states above mentioned to define the territory in which or the prices at which the product of the several factories or mills should be sold, yet such agreement, conspiracy, or combination is not necessarily within the prohibition of the statute, for to constitute a violation of the statute you must also be satisfied from the evidence beyond a reasonable doubt that said manufacturers thereby intended to restrain interstate commerce in cement in the market for Portland cement to an unreasonable degree, or that interstate commerce in cement was thereby restrained to an unreasonable extent.”

#### LIII.

The Court erred in refusing to charge the Jury as requested by those defendants in writing, as follows:

“It is entirely lawful for anyone to do what he can to prevent a transportation company from putting in a freight rate which he may deem unjust and discriminatory, and which he may think will injuriously and unjustly affect his business. Any number of persons who may be similarly situated may join in opposing the installation of such freight rate. It is in evidence that the Western Washington Cement Manufacturers and some of the Northern California Cement Manufacturers combined in 1915 to defeat a proposed change or reduction in the freight rate on cement from Irwin, Washington, to Portland, Oregon, and Vancouver, Washington, but this

action on their part was legitimate and lawful, and does not constitute any violation of the Sherman Act.”

#### LIV.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

“Manufacturers of Portland cement may lawfully ascertain the markets or territories in which and the price or prices at which other manufacturers of Portland cement sell or market their products, and haveing this information or knowledge may use the same in marketing their own product so long as they do not agree or combine or conspire with such other manufacturers, but act independently of them. It is only actions taken by agreement or combination or conspiracy with other manufacturers which the law prohibits.”

#### LV.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

“The indictment charges that an agreement, combination, or conspiracy was entered into between certain parties representing certain manufacturers of Portland cement in the states of California, Oregon, and Washington, to control or limit the territory in which the output of the several factories should be marketed and to fix the prices at which it should be sold, and that defendants Butchart and Moore, as the officers and agents of Oregon Port-



land Cement Company were parties to or became parties to such agreement, combination, or conspiracy, and that such agreement, conspiracy, or combination was entered into for the purpose of restraining interstate commerce in Portland cement in said states, and that such interstate commerce was thereby actually restrained. Before you can find either of the defendants Butchart or Moore guilty, you must therefore find or be satisfied by the evidence beyond reasonable doubt, first, that such agreement, conspiracy, or combination was entered into by the defendants named in the indictments or by some of them; second, that such agreement, combination, or conspiracy was entered into for the purpose of restraining interstate commerce in Portland cement in said states; third, that it did restrain or restrict such commerce; fourth, that the defendant or defendants Butchart and Moore were parties to or became parties to said agreement, conspiracy or combination; fifth, that the defendant or defendants Butchart and Moore were parties to or became parties to said agreement, conspiracy, or combination as officers or agents of Oregon Portland Cement Company; and sixth, that interstate commerce in said states in Portland cement would necessarily be restrained or was actually restrained by such alleged agreement; conspiracy or combination to an unreasonable extent or degree. If you find that one of the defendants Butchart or Moore was not a party to such agreement, combination or conspiracy, you must find him not guilty, and if you find that neither

of the defendants Butchart or Clark M. Moore was a party thereto, you must return a verdict of not guilty in favor of each of said defendants.”

#### LVI.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

“There is no evidence in this case which tends to show that either R. P. Butchart or Clark N. Moore monopolized or attempted to monopolize the trade or commerce in Portland cement among the states or combined with any person or persons to monopolize any part of the trade or commerce in Portland cement among the several states. You will therefore return a verdict in their favor in the second count of the indictment.”

#### LVII.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

“The evidence before you is not sufficient to establish the guilt of the defendant R. P. Butchart, and you are hereby directed to return a verdict in his favor of NOT GUILTY.”

#### LVIII.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

“The evidence before you is not sufficient to establish the guilt of the defendant Clark M. Moore,

and you are hereby directed to return a verdict in his favor of NOT GUILTY."

### LIX.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"Certain letters have been introduced, written by Aman Moore and addressed to R. P. Butchart, which contain statements or suggestions concerning the fixing of price, the allotment of territory, or agreements with other manufacturers. I instruct you that statements or suggestions made by Aman Moore recited or contained in such letters are not evidence against said Butchart and do not tend to prove the connection of said Butchart with any such agreements or combinations, unless it be further shown independent of such statements or suggestions so made by said Aman Moore and contained in said letters, that said Butchart acquiesced in said statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions so made by said Aman Moore and contained in said letters."

### LX.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"Letters have been admitted in evidence written by Aman Moore to R. P. Butchart and by R. P. Butchart to Aman Moore dated prior to April 14, 1916, the date upon which Clark Moore was se-

lected or appointed Sales Manager for the Oregon Portland Cement Company. Any statements contained in such letters or correspondence are not evidence for or against Clark Moore, unless you should find that such letters show a combination, conspiracy, or agreement as charged in the indictment, and that after Clark Moore became Sales Manager of the Oregon Portland Cement Company on April 14, 1916, he acted in furtherance of such combination or conspiracy and aided, abetted, or assisted in carrying out and performing the agreements so made."

## LXI.

The Court erred in refusing to charge the Jury as requested by these defendants, in writing, as follows:

"Various letters have been introduced written by officials or associates of officials from cement manufacturers in Washington and California to defendants Clark Moore and R. P. Butchart. I instruct that any statements, suggestions, or requests contained in such letters are not to be taken or deemed as evidence of the guilt or innocence of defendants R. P. Butchart and Clark Moore unless it be further shown by evidence independent of the statements contained in such letters that defendants Butchart or Clark Moore acquiesced in such statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions so made or contained in said letters."



## LXII.

The Court erred in overruling and denying the motion and application of each of these defendants to set aside the verdict of the Jury returned in this cause, and to grant a new trial to each of these defendants.

There are four headings which naturally suggest themselves in the presentation and discussion of the issues involved in the instant case.

**FIRST: THE INDICTMENT WAS DEFECTIVE, THE DEMURRER SHOULD HAVE BEEN SUSTAINED, AND NO EVIDENCE COULD BE LEGALLY SUBMITTED UNDER AN INDICTMENT SO DEFECTIVELY DRAWN AS THE ONE IN ISSUE:**

**SECOND: ERRORS COMMITTED BY THE TRIAL COURT IN ADMITTING EVIDENCE WHICH WAS INCOMPETENT AND IRRELEVANT AND PREJUDICIAL TO THE RIGHTS OF EACH OF PLAINTIFFS IN ERROR:**

THIRD: ERRORS COMMITTED BY THE TRIAL COURT IN EXCLUDING EVIDENCE WHICH WAS COMPETENT AND RELEVANT AND HAD A TENDENCY TO EXPLAIN THE ACTIONS AND CONDUCT OF EACH OF PLAINTIFFS IN ERROR:

FOURTH: ERRORS COMMITTED BY THE TRIAL COURT IN ITS CHARGE TO THE JURY.

THE INDICTMENT WAS DEFECTIVE, THE DEMURRER SHOULD HAVE BEEN SUSTAINED, AND NO EVIDENCE COULD BE LEGALLY SUBMITTED UNDER AN INDICTMENT SO DEFECTIVELY DRAWN AS THE ONE IN ISSUE.

The indictment is founded upon the Act of July 2, 1890, commonly known as the Anti-Trust Act, and attacks the trade in Portland cement as conducted by the concerns of which the defendants are respectively officers and agents in the territory embraced by Western Washington, Western Oregon, and the State of California.

The indictment in the first count purports to charge the defendants with violation of the first section of the Statute, and alleges that they are engaged in a combination in undue and unreasonable restraint of trade in cement conducted by the several concerns with which they are respectively connected.

The second count charges that the matters set forth in the first count also constitute monopolizing trade and commerce within the meaning of Section Two of the Act.

Defendants demurred to the first count, contending that the same is defective because:

First—The facts set forth do not constitute an offense.

Second—That no description of any combination in restraint of trade and commerce is set forth or alleged.

Third—The averments are too general, vague, indefinite and uncertain to inform defendants of the nature or cause of the accusation against them or any of them, or to apprise them with reasonable certainty of the offense with which they are charged, or may expect to meet on the trial.

The first ground of demurrer includes the second and third, as well as the objection that the indictment is not sufficiently definite and certain to enable the Court to determine what acts the Government claims violated the Statute, or whether such acts constitute a violation thereof; and further, that the indictment does not contain a direct averment laying venue within the jurisdiction of the Court.

Condensed, Count One of the indictment, without omitting any allegation of fact or averment which might be resorted to to sustain the same, is as follows:

“That divers concerns (naming those known to the Grand Jury) have, during the ten years last past manufactured cement in the State of California and west of the Cascade Mountain Range in the States of Washington and Oregon, and have engaged in the sale of the same directly and indirectly to consumers;

That practically all of the cement consumed in the territory mentioned during this time has been manufactured by said concerns (known and unknown); that large portions of the cement so manufactured was sold by the said manufacturers to consumers and dealers situated in states other than the one where the cement was manufactured, and large portions thereof were consigned to dealers and agents of the respective concerns in such other states for sale there by such agents and dealers; that such manufacturer selling, consigning and shipping constitute trade and commerce among the several states of the United States, and throughout said ten years each of said concerns has been engaged in said trade and commerce;

That since August first, 1914, the defendants named in the indictment were officers or agents (official capacity given) respectively of the several concerns mentioned therein, and that said defendants have been actively engaged at the respective (named) places of manufacture in the management,



direction and control of the business and affairs of the concerns with which they were severally connected; and, further, that said defendants continuously, during the period of time from the first day of August, 1914, to the day of the finding and presentation of the indictment unlawfully and knowingly have been engaged in a combination in undue and unreasonable, direct and oppressive restraint of said Interstate Trade and Commerce carried on by said several concerns—that is to say, a combination now here described in restraint of and which throughout such period of time has in fact restrained said trade and commerce in the manner now here set forth.”

The indictment, however, fails to describe any combination or manner in which it is claimed it was understood or agreed among the defendants that trade and commerce should be restrained pursuant to the alleged combination, but proceeds

“By ‘concerted action’ defendants throughout the period from August 1st, 1914, to the finding of the indictment carried on and conducted the business of the several cement concerns with which they were respectively connected without any competition as to the localities in California, Oregon and Washington in which they respectively sold cement, and by concerted action prevented:

First—Southern California Company from selling or consigning for sale their cement in either Washington or Oregon.

Second—Northern California Companies from selling or consigning for sale their cement in Washington.

Third—Washington Companies from selling or consigning for sale their cement either in Oregon or California.

Fourth—Oregon Company from selling or consigning for sale its cement either in Washington or California.

Fifth—Oregon Company and Northern California Companies from selling or consigning for sale their cement in Oregon, otherwise than upon arbitrary and known competitive prices fixed and agreed upon between them in advance of such sales and consignments for sales.”

It is then alleged that in consequence of such conduct and alleged want of competition:

- (a) All consumers of such cement in the localities mentioned in Oregon, Washington, and California have been deprived of the benefits of competition in the particulars aforesaid.
- (b) All consumers have been compelled to pay for such cement arbitrary prices and prices greatly in excess of the prices at which they would have secured cement if defendants had not engaged in said unlawful combination in restraint of such trade and commerce.

The indictment then concludes:

“And so the Grand Jurors \* \* \* do say that said defendants \* \* \* as aforesaid, during the period of time

from the first day of August, 1914, to the date of finding and presentation of the indictment in the said District Court of Oregon, and within the jurisdiction of this Court, and in the manner and form, and by the means aforesaid unlawfully and knowingly have engaged in a combination in restraint of trade and commerce among the several states, etc.

It will be noticed that Count One utterly and completely omits all description of a combination or description of the manner in which it was claimed the defendants understood or agreed among themselves that trade and commerce should be restrained pursuant to the alleged combination, and that aside from matters of inducement, which contain no charge of violation of law, the indictment absolutely fails to expressly allege any act or acts committed by defendants, or any of them.

The indictment is silent as to whether the combination was constituted by a union of capital or skill, and absolutely fails to state the means agreed upon or contemplated for effecting the alleged combination, whether formed by the defendants alone or by defendants in cooperation with others; whether the defendants originated the combination or became parties to a combination already formed does not appear. No facts are charged. The indictment is but a conclusion of law. It fails to define the offense. It furnishes no facts from which the Court can determine whether the restraint contemplated or to be effected was undue or unreasonable. All particulars constitutnig the offense are want-

ing. The indictment fails to allege or charge that the concerns mentioned were ever competitors or sold cement in the same territory, or in the territory in which it is averred sales were prevented, nor does it appear that the defendants named had power to control the business of the concerns mentioned. It contains no allegation of oppression or coercion, either of the parties to the combination, or of competitors or agents, or of reduction of supply or consumption, or of destroying or injuring the business of competitors or preventing them from doing business, and no allegation was made that prices were raised, or that prices obtained were unreasonable.

The allegations purporting to set forth what was done by defendants are vague, general, indefinite and uncertain, and are but the mere conclusions of the pleader, and are wholly insufficient for any purpose. They do not define or describe the particular combination referred to, nor the offense attempted to be charged, nor set forth the acts or any of them committed by defendants which constitute "engaging in a combination". They contain none of the particulars as to time, place and circumstances essential to a criminal charge. The indictment omits to lay venue by direct averment as required by the rules of the criminal pleading. Jurisdiction of the Court is made to appear only by conclusion of the pleader.

Count One of the indictment is therefore insufficient because—

1. It does not contain a description of, or set forth, or show any combination in undue or any restraint of trade and commerce.



2. The averments contained in said count are too general, vague, indefinite and uncertain—(a) to define the exact defense attempted to be charged; (b) to define the combination therein referred to or separate and distinguish it from any other combination in restraint of trade; (c) to inform or appraise the defendants of the nature or cause of the accusation against them with such reasonable certainty as to enable them to make their defense; (d) to enable the defendants to avail themselves of their acquittal or conviction against further prosecution for the same offense; (e) to inform the Court of the facts so it may decide whether they are sufficient in law to constitute an offense in support of conviction; (f) to inform the Court of the facts so that it may decide whether the alleged combination was designed to, or would in fact unduly or unreasonably restrain trade and commerce; (g) and further, the allegations purporting to set forth what was done by the defendants are insufficient because repugnant and inconsistent.

3. The indictment does not particularly charge any act as having been committed within the district of Oregon, and no venue is laid therein except by way of conclusion of the pleader made from previous allegations in the indictment, none of which allege the commission of any act within the district of Oregon.

4. By reason of the omissions and indefiniteness and uncertainty mentioned, no offense is charged in or by said count.

Where the statutory definition of an offense includes generic terms, or embraces acts which it was not the intention of the statute to punish, the indictment must state the species, it must descend to particulars.

*U. S. vs. Cruickshank*, 92 U. S. 542, 23 L. Ed. 588, 22 Cyc. 343;

*Batchelor vs. U. S.*, 156 U. S. 426, 34 L. Ed. 478;

*U. S. vs. Wardell*, 49 Fed. 914;

*U. S. vs. Kessel*, 62 Fed. 59;

*In re Greene*, 52 Fed. 111;

*U. S. vs. Patterson*, 55 Fed. 605;

*U. S. vs. Bopp*, 230 Fed. 723.

In an indictment every fact necessary to constitute the crime charged must be directly and positively alleged. Nothing can be charged by implication or intendment, nor is it sufficient to charge any material matter by way of argument, conclusion, or recital.

*U. S. vs. Cruickshank*, 92 U. S. 542;

*U. S. v. Hess*, 124 U. S. 483;

*U. S. vs. Ford*, 34 Fed. 26;

*U. S. vs. Post*, 113 Fed. 852, 22 Cyc. 293.

Many combinations in restraint of trade are legal and even commendable.

*U. S. vs. E. C. Knight Co.*, 156 U. S. 1 39 L. Ed. 35;

*Hopkins vs. U. S.*, 171 U. S. 578;

*U. S. vs. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 653;

*Standard Oil Co. vs. U. S.* 221 U. S. 1, 55 L. Ed. 619;

*U. S. vs. Trans-Missouri Freight Association*, 58 Fed. 58;

*Whitwell vs. Continental Tobacco Co.*, 125 Fed. 454;

*Union Pacific Coal Co. vs. U. S.* 173 Fed. 737;

*U. S. vs. Southern Wholesale Grocers' Assn.*, 197 Fed. 434.

Only combinations in undue restraint of trade are denounced by the statute.

*Nash vs. U. S.*, 229 U. S. 373-376, 57 L. Ed. 1232;

*U. S. vs. Whiting*, 212 Fed. 475.

The indictment must describe the combination.

*U. S. vs. Hess*, 124 U. S. 483, 31 L. Ed. 516;  
*U. S. vs. Cruickshank*, 92 U. S. 542;  
*U. S. vs. Post*, 113 Fed. 852;  
*Etheredge vs. U. S.*, 186 Fed. 434;  
*U. S. vs. Beatty*, 60 Fed. 740;  
*Stuart vs. U. S.*, 119 Fed. 89;  
*Dalton vs. U. S.* 127 Fed. 544;  
*U. S. vs. Bernard*, 84 Fed. 634;  
*Pettibone vs. U. S.*, 148 Fed. 197;  
*Vol. 5, Ruling Case Law*, page 1085.

The requirement last above mentioned has been uniformly observed and applied.

*U. S. vs. Patterson*, 55 Fed. 605;  
*U. S. vs. McAndrews and Forbes*, 149 Fed. 823;  
*U. S. vs. Patten*, 187 Fed. 672, 226 U. S. 525;  
*U. S. vs. Nash*, 186 Fed. 592, 596; 229 U. S. 373;  
*U. S. vs. Winslow*, 227 U. S. 202;  
*U. S. vs. Patterson*, 201 Fed 697;  
*U. S. vs. Swift*, 188 Fed. 97.  
*U. S. vs. Rintelen*, 233 Fed. 793.



The allegations of what was done to further an alleged combination are irrelevant and cannot be used to enlarge the necessary allegations of the indictment, and are of no avail.

*U. S. vs. Patterson*, 55 Fed. 605-639;

*U. S. vs. Britton*, 108 U. S. 199;

*Pettibone vs. U. S.* 148 U. S. 197;

*U. S. vs. McAndrews and Forbes*, 149 Fed. 823,  
831;

*McKenna vs. U. S.*, 127 Fed. 798.

There can be no monopoly which does not constitute an unreasonable restraint of trade.

*U. S. vs. Whiting*, 212 Fed. 466-478.

To constitute the offense of monopolizing or attempting to monopolize trade, it is necessary to acquire an exclusive right in such commerce by means which will prevent others from engaging therein. A monopoly in the prohibitive sense involves the element of an exclusive privilege or grant, which restrains others from the exercise of a right or liberty which they had before the monopoly was secured. In re *Green*, 52 Fed. 104.

A monopoly of trade embraces two essential elements (1) an acquisition of an exclusive right, (2) or the exclusive control of that trade to the exclusion of all others from that right and control.

*U. S. vs. Trans-Missouri Freight Association*,  
58 Fed. 58-82.

The word monopolize used in section 2 of the act is the basis and limitation of the statute, and hence an indictment must show a conspiracy in restraint by engrossing or monopolizing or grasping the market.

*U. S. vs. Patterson*, 55 Fed. 605.

To constitute monopolizing, in addition to acquisition and acquirement, there must be an attempt by unlawful means to exclude others from the same traffic or business or from acquiring by the same means property and material things.

*U. S. vs. Reading*, 183 Fed. 456.

No monopoly exists when individuals own large quantities of a commodity and an indictment is fatally defective, which alleges only a scheme to demand monopolistic prices as a result of individual, as distinguished from collection effort.

*U. S. vs. Patton*, 187 Fed. 672.

The word "monopolize" is used in this section in a legal and accurate sense. Its root idea is to exclude. To monopolize trade or commerce or a part thereof is to exclude persons therefrom.

*Patterson vs. U. S.*, 222 Fed. 599.

In the case of "loose combinations" where each party to the combination remains in the field, it is not proper to say that there is a monopolizing as in that contingency there is no exclusion.

*Patterson vs. U. S.*, 222 Fed. 599.

The first sentence of Section 1 of the act so far as it applies to this indictment declares illegal every \* \* \* combination in the form of trust or otherwise \* \* \* in restraint of trade or commerce among the several states or with foreign nations.

The word "combination" at the time of the passage of the act had not and even now has no accurate and definite meaning in the criminal law. Of itself it means no more than cooperation or union of effort.

The word "trust" and the phrase "combination in the form of trust," however, were well understood at the time of the enactment of the Sherman law to mean any combination of capital, skill, or acts by two or more persons, firms, corporations, or associations for the purpose of monopolizing or restraining trade in any community to the injury of the public.

Penal Code Texas, Article 976;

Bates Annotated Statutes of Ohio, Section 4427;

General Statutes of Kansas, 7684.

The statutes above referred to are declaratory of the common law meaning of the word "trust" and phrase "combination in the form of trust" as understood at the time the Sherman law was passed and convey an accurate idea of the character and type of cooperation and association aimed at by the statute; that is, combinations formed by the capital, skill, or acts of the parties



to the combination were in the legislative mind. Accordingly, an indictment charging parties with engaging in a combination should clearly show whether the combination was formed by the union of the capital, the skill, or the acts, or all of them, of the parties to the combination.

The word "combination," unlike the word "conspiracy," does not in itself import criminal acts or criminal purposes.

Many combinations are legal, even commendable.

In *Nash vs. U. S.*, 229 U. S. 373, 376, the Supreme Court says:

"Those cases (referring to the Standard Oil and American Tobacco Company cases) may be taken to have established that only such \* \* \* combinations are within the act as by reason of the intent or the inherent nature of the contemplated acts prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

To charge an offense under the statute a combination prohibited by the statute as construed by the courts must appear. To accomplish this a description of the combination must be set out in the indictment showing not only who formed the combination and what was combined, whether capital, skill, or acts, but must show by direct and positive allegations what acts, what skill, or what capital was included in the alleged combination and that the clear intent or the inherent nature of the contemplated acts set out prejudiced public interest by

unduly restricting competition or unduly obstructing the course of trade, otherwise the court cannot say whether or not an alleged combination is illegal.

The second sentence of Section 1 of the act provides that every person who shall \* \* \* engage in any such combination \* \* \* shall be deemed guilty of a misdemeanor. The combination here meant is the one referred to in the first sentence of the section. To render one liable thereunder he need not have been a party to the formation of the conspiracy but may have become a party later on.

Where one comes into a combination after its formation the indictment should not only clearly describe the combination, its purposes, and the means devised to effect them, but should set forth the particular acts committed by the party charged which it is claimed constitute engaging in a combination so that the court can say whether as a matter of law the acts alleged made the person charged a party to the combination previously described in the indictment and constitute engaging therein.

In an indictment every fact necessary to constitute the crime charged must be directly and positively alleged. Nothing can be charged by implication or intendment, nor is it sufficient to charge any material matter by way of argument, conclusion or recital. The indictment in the instant case absolutely ignores such rule.

In the case of *U. S. vs. Cruikshank*, 92 U. S. 542, the court says:

“Where the definition of an offense, whether it be at common law or by statute, ‘includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, it must descend to particulars.’ 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.”

None of these conditions are observed in the indictment under consideration. No particularity of time, place or circumstances is set forth from which defendants can determine what acts the government will rely upon. Only conclusions and recitals appear and therefore they could not prepare their defense. The particular offense is not defined, is not separate from other offenses so as to avail defendants of their conviction or acquittal for protection against a further prosecution for the same case. Innumerable forms of concert of action which constitute an illegal combination having the identical effect charged in the indictment may have

occurred and an indictment might be returned for each. Unless the particular form of concert of action by the indictment is disclosed the rule against a second prosecution for the same offense is not available. It was impossible for the court to tell from the indictment whether a combination in fact existed, whether defendants or any of them engaged therein, or whether the restraint referred to was undue or unreasonable.

The rules of criminal pleading require that every indictment define the offense sought to be charged; that is, separate the specific offense from the body of crimes, and particularly from all crimes of the same class as the one involved in the indictment. This requirement is exacted so that the defendant may avail himself of his conviction or acquittal, and also to enable the court to determine whether the particular acts charged constitute an offense. A crime is defined ordinarily within the rule under discussion by stating the particular acts committed by the defendant and the time and place where committed, together with the relation of such acts to third persons or to the public or to the particular subject matter involved. Count One of the indictment under consideration entirely omits to describe the combination referred to in the indictment. It contains no more than a charge in the language of the statute. The pleader apparently recognized the necessity of describing the combination for he uses the words "now here described" and "now here set forth" in the body of the indictment, but utterly fails to describe or set forth the crime attempted to be charged.

The case of *U. S. vs. Hess*, 124 U. S. 483, is probably the leading case upon the principle or criminal



pleading which requires a particular description of the combination, scheme or conspiracy where the same constitute an essential element of an offense under the federal statutes. That and other cases announcing the same requirement, however, only apply the elementary and fundamental rule that a crime must be particularly defined. In such case the court says:

“The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially or by way of recital.”

In the Hess case the indictment charged in the language of the statute that the defendant devised a scheme to defraud without properly describing the scheme and further charged that a letter was mailed in furtherance of the scheme. It is plain that averments of mailing a dozen letters, even though the contents of the letters set out showed a scheme to defraud, would not supply the

omitted description of the scheme. So in the instant case the omission to describe the combination cannot be aided or supplied by allegations of what was done pursuant to the alleged combination.

The rule in the Hess case was applied by the court in the case of *United States vs. Bopp*, 230 Fed. 723. There the defendants were charged with conspiracy to commit the offense of beginning or setting on foot or providing or preparing means for a military expedition in violation of Section 13 of the penal code. The court in sustaining a demurrer to the indictment said:

“Neither this statute nor any other declares what is meant therein by the words ‘military enterprise,’ nor what would be required to constitute such an enterprise, so that in giving effect to the statute the court must determine from other sources what Congress meant when it used these words. So far as the conspiracy itself which is charged in this indictment is concerned, it is stated in the language of the statute without amplification; that is to say, there is no statement that defendants conspired to do certain things which, if accomplished, would in the judgment of the pleader constitute the beginning or setting on foot or the preparing or providing means for a military enterprise, and upon the sufficiency of which things to constitute such offense the judgment of the court might be exercised.

\* \* \* \* \*

The sole charge against the defendants here is that they conspired ‘to begin and set on foot, and

prepare and provide the means for certain military enterprises.' This is the bald language of the statute; the mere conclusion of the pleader. But the particular things which they conspired to do are not stated—the things which, if in fact accomplished, would constitute the setting on foot or providing means for a military enterprise. What does the pleader understand the words 'military enterprise' to mean? What in his judgment constitutes a military enterprise? The indictment gives neither the defendants nor the court any information in this regard, and the things that the pleader might regard as sufficient to warrant him in asserting that defendants conspired to set on foot or provide means for a military enterprise might in the judgment of the court fall far short of being the things intended by the statute."

The charge in the indictment in the instant case that defendants engaged in a combination, like the allegation in the Bopp case that defendants conspired to set on foot a military enterprise, is a mere conclusion of the pleader and that is not sufficient as a criminal pleading in this case any more than it was in the Bopp case.

In *Batchelor vs. United States*, 156 U. S. 426, the court in discussing the sufficiency of an indictment charging wilful misapplication of the funds of a national bank under Revised Statutes Section 5209, said:

"By the settled rules of criminal pleading, and by the previous decisions of this court, the words

‘wilfully misapplies,’ having no settled technical meaning (such as the word ‘embezzle’ has in the statutes, or the words ‘steal, take and carry away’ have at common law) do not, of themselves, fully and clearly set forth every element necessary to constitute the offense intended to be punished; but they must be supplemented by further averments, showing how the misapplication was made, and that it was an unlawful one. Without such averments, there is no sufficient description of the exact offense with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause.”

The words “engage in a combination” do not describe the exact offense with which the defendants are charged any better than do the words “wilfully misapply” in the Batchelor case.

The principles established by those cases exact of the prosecution only common fairness to defendants. One of the courts said in discussing an indictment under Section 5480 Revised Statutes, now Section 215 of the Penal Code, that one of the reasons for requiring a clear and definite description of the scheme or artifice to defraud grew out of the fact that all schemes to defraud were not criminal. The same reason applies to the requirement that a combination be definitely described. All combinations in restraint of trade are not illegal. Only those that unduly or unreasonably restrain trade are so. “An indictment must allege facts



warranting a finding by the jury that the restraint was unreasonable.”

*United States vs. Whiting*, 212 Fed. 479.

Further analysis of the indictment will demonstrate that it is vulnerable to the objection of indefiniteness and uncertainty made by the demurrer. Aside from identifying the defendants, the first three pages and down to the center of page four consist of matter of inducement. Neither in this part of the indictment nor elsewhere therein does it appear that any of the companies with which the defendants were connected were ever competitors. For all that appears from the indictment the Oregon company and the California companies may never have sold any cement in Washington, and if they did the same may have been sold in Eastern Washington or in a portion of Washington never supplied by the Washington companies. The Washington companies may have sold cement in Oregon or they may not have so far as the indictment shows, but if they did so sell cement the same may have been sold in territory not supplied by either the Oregon or California companies. The same absence of definite allegation occurs with respect to trade in California. No allegation of oppression or coercion either of the parties to the alleged combination or of competitors or others occurs. No allegation of reduction of supply or consumption is made. No charge of destroying the business of competitors or preventing them from doing business is made. There is no allegation that prices were raised or that the prices obtained were unreasonable. It is not alleged

that the concerns mentioned in the indictment manufactured or sold practically all of the cement used in the territory in question but that divers concerns did so. It is not alleged what part of the trade the divers concerns not named had, nor how many of much divers concerns existed. It is not alleged that the defendants controlled the business of the concerns with which they were connected respectively nor what part they had in such control, but only that they were actively engaged in the management, direction, and control of the business of the concerns. It is not stated whether the concerns were co-partnerships or corporations, or how they were conducting business. The omitted information is all material to a charge such as the one suggested by this indictment.

Following the description of the defendants on page four of the indictment occurs the charging part thereof, which actually ends with the words "here set forth" on that page. This part of the indictment omits to lay venue and omits to state whether the combination mentioned therein was formed by defendants alone or by them and others and contains the mere conclusion of law that defendants "engaged in a combination." It omits to describe or set forth the character of the alleged restraint of trade, either as to quantity or territory, but contains only a promise to describe the combination and the manner in which it restrained trade. No authority can be found holding that this charge in itself is sufficient, while the books are full of precedents holding that it is not sufficient.

The pleader knew the necessity of describing the combination and the manner contemplated thereby for

effecting the alleged restraint of trade or the promise to set them forth would not have been made.

Instead of fulfilling the promise mentioned, the next paragraph contains indefinite conclusions of the pleader as to what it is claimed was done by the defendants, together with the alleged result of their acts.

It has been repeatedly and consistently held that allegations of what was done to effect an alleged conspiracy or combination are irrelevant and cannot be laid hold of to enlarge the necessary allegations of the indictment, and are of no avail.

*Pettibone vs. U. S.*, 148 U. S. 197.

The reason for the rule arises out of the fact that the offense is complete when the combination is formed or agreed upon without the commission of an overt act, and that therefore the subsequent acts done in execution of the plan add nothing to the offense previously complete, but only furnish evidence of its existence. In this case how is it to be known whether the things alleged to have been done were in pursuance of the combination it is charged defendants engaged in when the combination itself is not described. The things they are alleged to have done may have related to something entirely foreign to the combination the grand jury or the pleader had in mind.

With the foregoing principles in mind, the allegations of the indictment of what was done will be examined. In setting out what is alleged was done no particular acts or species of acts are alleged, but the averments are embraced and blanketed in the indefinite

phrase, "by concerted action," which is merely the conclusion of the pleader. "Concerted action" imports no more than a number of related acts. Whether the acts in the mind of the pleader have the effect he thinks they do or whether they were committed in concert or in relation to each other cannot be determined by the court unless the acts themselves, or the character or type, or species thereof where numerous acts of the same character or type have been committed, are clearly and definitely set out in the indictment. The court may differ from the pleader.

*U. S. vs. Bopp*, 230 Fed. 726.

All concert of action is not criminal any more than are all combinations, and unless the particular acts or the type, species or character of the acts are set out, it is impossible either for the court or the defendants to determine whether a violation of law is charged. All the authorities hold that persons may enter into many combinations for trade which are entirely innocent and which are wholly within the law.

Likewise, it must be conceded that innumerable acts done by persons engaged in the same line of trade may be done by agreement or by concert of action, which are not condemned by the statute. In fact, it is almost impossible for men engaged in a territory in the same line of trade to avoid more or less concert of action.

The conduct of any line of business demands more or less concert of action, association, cooperation and harmony for its proper conduct. The phrase "by concerted action" is not more definite than the word com-



bination previously used in the indictment, and no additional information was given the defendants or the court by the use thereof. The defendants were entitled to know from the indictment what acts and when and where and how and by whom committed, which the government claim constituted concert of action amounting to a violation of this criminal statute, and the law requires that the allegations of the indictment shall be so direct, definite and positive as to enable the court to determine whether or not the acts relied upon and the manner of their commission constitute concert of action and necessarily involve a continuing agreement to do them, and disclose a particularly defined combination in undue, direct, unreasonable and oppressive restraint of trade.

Engaging in a combination in undue and unreasonable restraint of trade and commerce is the gist of the offense. In every case the contemplated restraint must be undue and unreasonable.

*In re Greene*, 52 Fed. 111.

In the present indictment the allegation is—

“Defendants have, by concerted action, carried on and conducted said business without any competition as to the localities in said states of Washington, Oregon and California \* \* \* etc.”

This allegation is clearly a conclusion of law, and if it is not it is so vague and indefinite that it has no value whatsoever in a criminal pleading. No duty or obligation to compete, or capacity therefor upon the part of the concerns named is shown, nor that any competition be-

tween them ever existed or could exist in the localities mentioned.

It is not alleged and appears only by the vaguest inference that all of the defendants and concerns involved could or did sell their respective products in the entire territory under consideration, or that they desired to do so, neither is it alleged that they or any of them would have sold therein but for the alleged "concerted action." Without stating how, or by whom, or by what means, it is alleged in effect that some of the companies were prevented from selling in some part of the territory. It is impossible to determine what acts concerted or otherwise could have prevented the Washington companies from selling cement in California. If the Washington companies desired to sell cement in California what possible concerted action could their officers and agents have entered into with the officers and agents of the California and Oregon companies by which they would have been prevented from selling in California, and what imaginable concert of action could the officers of the Southern California company engage in with the officers and agents of all the other companies, which would have prevented it from selling its product in either Oregon or Washington or both of them, if they so desired. Necessarily any such action would have been antagonistic to the desire which the indictment by implication asserts each of the defendants had.

"Prevented" as here used conveys the idea of the exertion of opposing and antagonistic force or action to overcome and which does overcome resistance exerted by the concerns upon which the concerted action acted, while

any "concerted action" used to include all the opposing actors, signifies harmony of action exerted to the same end by all concerned. Here we have a flat contradiction in terms in the same sentence—a fatal repugnancy. If what is alleged were otherwise sufficient, still it is impossible. "Concerted action" by "insiders" might prevent an "outsider" from doing something he otherwise would do, but "Concerted action" by "insiders" cannot prevent an "insider" from doing what he otherwise would do because immediately prevention commences, concert ceases. The one term signifies opposition, the other cooperation. The same persons cannot oppose each other and cooperate concerning the same matter and thing at the same time.

This fatal inconsistency is not removed by distinguishing between defendants and the concerns of which they are alleged to be officers or agents; here the mind of the agent is the mind of the concern; the act of the agent is the act of the concern; the resistance of the agent is the resistance of the concern and the cooperation of the agent is the cooperation of the concern. To deny this is to utterly destroy the indictment. If the control of the agent at this point does not become the mind of the concern, neither does it at any other point.

The only rational way by which the several companies could have been prevented from doing the things which the indictment asserts they were prevented from doing, was either by the conditions or laws of trade, or by an agreement or mutual understanding. If they were prevented by the conditions or laws of trade from doing the things they otherwise might have done, then the government has nothing to do with the situation.

If, however, they were prevented by mutual agreement or understanding, the government knows what that agreement or understanding was, and it is incumbent upon it to set it forth in the pleadings before the defendants are called upon to answer. In such case it would be the provisions of the agreement and the penalties of a breach thereof that would prevent, not the acts done under the agreement.

If it is contended that the indictment charges that the concerns in question refrained from selling cement elsewhere than in the State where manufactured, except that the Northern California companies made sales in Western Oregon, the answer is that the indictment does not so allege, but on the contrary asserts that by some undisclosed acts of some of the officers and agents of the respective concerns, whose ability to control them is not alleged, they were prevented from selling elsewhere than in the State where the cement was manufactured. The very character of the business, and of the product, renders it most likely that, the main business of a cement concern will be transacted close to the factory. Cement when considering its value or selling price, is heavier on a fixed ratio of price than almost any other product in commerce. Therefore it must find consumers near the producing point if the product is universally manufactured. The raw materials for cement are found in all parts of the United States. That being the case, the consumption of the greater portion of the product is reasonably near the place of manufacture, for freight rates preclude long hauls.

If an arrangement had in fact been made by which each State was to be supplied by its own domestic manu-



facturers, such an arrangement would not necessarily be an unreasonable one in itself. In fact, if the home producer could supply the home market it would be only an economic measure to prevent ruinous competition from other States, whose manufacturers under normal conditions, could not successfully compete in the home market.

Whether a restraint of trade is unreasonable or undue depends upon the particular facts of each case, and the Court cannot determine whether the situation disclosed by those facts constitute a violation of the statute unless the facts are set forth in the indictment with reasonable particularity of time, place and circumstances.

It may be claimed that the allegation that the defendants "by concerted action" prevented the Oregon company and the Northern California companies from selling or consigning for sale their cement in Oregon, otherwise than upon arbitrary and non-competitive prices, fixed and agreed upon between them in advance of said sales and consignments for sales, is sufficiently definite in itself to save the indictment. This allegation is subject to the same objections of indefiniteness and uncertainty as the others by reason of its failure to disclose the particular acts, or character of acts, embraced in the phrase "by concerted action"; the inconsistency before pointed out is also present, and besides the allegations concerning prices are not direct and positive allegations, but made merely by way of recital which render them valueless for any purpose. The allegation is ambiguous for the reason that it cannot be determined therefrom whether the prices were fixed and agreed upon between all of the defendants, or any

of them, or between the Oregon and Northern California companies alone. It is entirely legal for parties to agree upon and provide for a uniformity of prices.

“If the object of the contract had been merely to provide in good faith a uniformity of prices among the parties thereto to avoid unhealthy fluctuations in the market, or if the contract had contemplated a joint and mutual association between the parties for the common benefit in the nature of a partnership, and had simply fixed the prices at what they considered the business would bear, instead of combination between independent manufacturers and dealers, for the purpose of at least destroying all competition between themselves, then there might have been nothing in such an arrangement which the courts could denounce as pernicious and forbidden by law.” *Marr, J., Texas Standard Cotton Oil Co. vs. Adoue*, 83 Tex. 650, 657, 19 S. W. 274, 276 (15 L. R. A. 598, 29 Am. St. Rep. 690.)

“The public has no right to unrestricted competition among all the persons engaged in any given business, nor to the benefit of prices produced by such competition. *Meredith vs. Zinc & Iron Co.*, 55 N. J. Eq. 211, 221, 37 Atl. 539, per Pitney, V. C.; *Joyce, Monopolies*, Sec. 101. The manner in which the restriction is effected—assuming no illegal intent to have existed—is not material, whether by a combination, by the appointment of a joint agent, or, as in this case, by mere agreement.” *U. S. vs. Whiting*, 212 Fed. 475.

Even though the allegation as to prices could be considered in aid of the indictment, yet it is seen that what is there set forth indirectly and by way of recital, is under the authorities, entirely legal and permissible.

The indictment terminates with the conclusion of the pleader, and, "so the grand jurors \* \* \* do say that said defendants as aforesaid, etc. \* \* \*". These words are merely the conclusions of law drawn from the preceding averments. If the averments are bad, the conclusions will not aid them. If they are good, and sufficiently describe the crime as the law requires by proper averments, formal concluding words are immaterial. *3d Chitty Criminal Law* 737.

It is thus seen that the concluding portion of the indictment adds nothing to what is previously set forth, and on its face it purports to be and is the mere conclusion drawn from the preceding averments. Nowhere in the preceding averments occurs any allegation or statement as to where the transactions, of which the indictment suggests the existence, or any of them, occurred, and it is submitted the conclusion of the pleader from the previous averments, that the alleged offense was committed in the State of Oregon, and within the jurisdiction of the trial court, is not a sufficient allegation of venue or jurisdiction, and nowhere else in the indictment does any allegation giving the court jurisdiction occur.

It is submitted that the first count of the indictment is wholly insufficient and that the demurrer should have been sustained, and the objections of these defendants to the introduction of any evidence in said cause upon the ground that the indictment did not state facts suf-

ficient to charge a crime of any kind or in violation of the law should likewise have been sustained.

Count Two of the indictment in effect charges the defendants monopolized trade and commerce; that is, created a monopoly by the transactions and in the manner and form set forth in Count One of the indictment. The demurrer attacked both counts upon substantially the same grounds. All of the essential elements of the combination in restraint of trade are necessary to a charge of monopoly and in addition thereto an indictment charging monopoly must show an acquisition of an exclusive right to, or the exclusive control of the trade in question, to the exclusion of others from that right and control by unlawful means.

There can be no monopoly which does not constitute an unreasonable restraint of trade, and therefore where it is contended that a monopoly was effected by a combination, or engaging in a combination in restraint of trade, the indictment must at least meet the requirements of an indictment which charges engaging in a combination.

The indictment in the instant case has been already sufficiently shown in the discussion on the demurrer to Count One of the indictment, does not sufficiently allege a combination in restraint of trade, much less of monopolizing trade by means of such combination. Nothing appears in the indictment showing, or even indicating that defendants or any of them obtained any exclusive privilege which restrained others from the exercise of a right or liberty which they had before the alleged monopoly was secured. It appears from the indictment that each concern sold its own product as before, and



it does not appear that outsiders were effected in any manner whatsoever, or that any means to exclude others were employed. No engrossing or monopolizing or grasping the market, or restraint thereby is alleged. No allegation of acquisition of an exclusive right or the exclusion of others therefrom is charged or shown, and no unlawful means are disclosed by the indictment by which others were excluded or attempted to be excluded from the same traffic or business. In short, the indictment contains none of the essentials of a charge of monopolizing.

The combination, if any, was what has been designated as a loose combination. Concerning such combination the court in *Patterson vs. United States*, 222 Fed. 599, says:

“The word ‘monopolize’ is used in this section in a legal and accurate sense. Its root idea is to exclude. To monopolize trade or commerce, or a part thereof, is to exclude persons therefrom. It is not, however, to exclude all persons. In the case of a perfect monopoly, which in experience has arisen only from a sovereign grant, the exclusion is of all persons but one, or perhaps, a group of persons.  
\* \* \* But it is not such monopolizing that the section has in mind. It is monopolizing by the acts of individuals. \* \* \* In the case of such a monopoly it would seem that it is not essential that all but the insiders be wholly excluded so that they have the whole field to themselves. It is sufficient that outsiders are substantially excluded, so that the insiders have to themselves approximately, or ‘a largely pre-

ponderating part of,' the whole field. \* \* \* It is possible for there to be a monopolizing by a combination of competitors. Such combinations have been divided into 'combinations by agreement,' or 'loose combinations' in which each member of the combination remains in the field, notwithstanding the combination, as in the case of *Addyston Pipe & Steel Co. vs. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and 'combinations by fusion,' or 'corporate combinations,' as in the *Standard Oil* and *Tobacco Cases*. Possibly in cases of the former class, where there is no exclusion of outsiders, it is not proper to say that there is a monopolizing, as in that contingency there is no exclusion. At most it may not be proper to say more than that there is a combination in restraint of trade. But in the latter case, notwithstanding there is no exclusion of outsiders, there is no reason for not characterizing what has been done as monopolizing, for in such case there is exclusion. The members of the combination are excluded for the benefit of the single corporation into which they are fused." *Patterson vs. U. S.*, 222 Fed. 619-620.

It will be noticed that the court in the last mentioned case states that loose combinations are formed by agreement. No agreement is charged in the indictment, only concerted action. If the acts constituting concerted action are sufficient to establish an agreement, the allegation of the indictment should have been that a designated agreement was entered into by the defendants, not that they committed acts in concert, and if the concerted

action shows anything less than an agreement, it does not constitute a loose or any kind of combination essential as the basis of a monopoly. Whether the acts referred to constitute concerted action or a combination or monopolizing cannot be determined by the court unless they are set forth in the indictment.

It follows that something more is required to constitute the offense of monopolizing under the statute than is required for engaging in a combination in restraint of trade. It has been conclusively shown that the indictment does not set forth facts sufficient to constitute a combination in restraint of trade. Hence it is insufficient as a charge of monopolizing. No grasping of the trade or exclusion of others therefrom by lawful or other means essential to a charge of monopolizing appears from the indictment. The charge is therefore wholly insufficient and the demurrer should have been sustained, and the objection of these defendants to the introduction of any evidence was properly taken and should have been allowed and sustained by the court.

**ERRORS COMMITTED BY THE TRIAL COURT IN ADMITTING EVIDENCE WHICH WAS INCOMPETENT AND IRRELEVANT AND PREJUDICIAL TO THE RIGHTS OF EACH OF PLAINTIFFS IN ERROR.**

It would serve no useful purpose and unduly lengthen the brief of plaintiffs in error to the extent of wearying both the Court and counsel, for us to discuss seriatim each and all of the errors committed by the trial court under this subheading. We shall therefore confine ourselves to taking some of the most glaring instances which in the opinion of counsel for plaintiffs in error were the most prejudicial and most seriously affected the jury in influencing them in arriving at an unjust verdict.

The first instance we desire to consider is the letter written to the Treasury Department bearing date February 2, 1915, written by Aberdeen Manufacturing Co., W. R. Lebo & Co., and T. V. Darragh Co.

The letter in question, Plaintiff's exhibit No. 40, was offered in evidence over the objection of counsel for plaintiffs in error and was submitted under the instructions of the court only for the purpose of showing that a complaint had been made to the Government. Counsel for the Government then decided to read the letter to the jury and again counsel for plaintiffs in error objected on the ground that the contents of the letter would not be evidence. The Court advised the jury that the letter itself was not evidence to be considered by them of any facts stated in it, and an instruction was given by the Court repeating this advice. Notwithstanding the advice of the Court to the jury that the statements contained in the letter were not evidence of any fact therein stated, the Court did allow the prosecution to read such letter in its entirety to the jury. The letter itself, as will be noticed, is a complaint by the signers to the Treasury



Department, reporting what the signers claim to be a predicament they find themselves in, in that, due to a combination which the letter alleges to have been made to control the sale of cement in Hoquiam, Washington, the signers were to be deprived of their business. The letter then states that the combination was apparently entered into by the Superior Portland Cement Company, the Washington Portland Cement Co. and the Olympic Portland Cement Company of the State of Washington, and by the Pacific Portland Cement Company and the Henry Cowell Lime & Cement Company of California, and one F. G. Foster, a local dealer in the city of Hoquiam, Washington, and alleges that prior to such combination the city of Hoquiam and vicinity had been supplied by all of the signers to such letter of complaint, but that owing to the combination they were deprived of handling cement, and that after the alleged combination had gone into effect, the price was raised 30c per barrel to the consumer; that the parties to the combination were selling cement at a lower price in other localities, but owing to the combination of which the letter complained, they were asking arbitrary prices in Hoquiam.

We do not know of any rule of evidence by which the letter was admissible for any purpose whatsoever. It was a letter written by third persons, not in any way connected with appellants in error, and contained statements which were in no way connected with appellants in error and such letter was written prior to the time appellants in error began the manufacture of cement. If it were not evidence of any of the facts stated therein, it was not evidence at all. The rule that communications

of this character are not admissible in evidence is such elementary law that we hardly deem a citation necessary. We call the Court's attention however to the case of *Consolidated Grocery Co. vs. Hammond*, 175 Fed. 641; 645, wherein, in reference to a letter written by a third person which the trial court allowed to be introduced, the appellate court by Shelby, Judge, says:

"The letter having been written by a third person, without the knowledge of the defendants and without their subsequent sanction or approval, seems to us to be hearsay testimony so far as the defendants are concerned, and for that reason inadmissible against them."

The parties before the Court in the instant case are charged with a breach of what is commonly termed the Anti-trust Acts, and no proof is needed to this Court that the public is all too ready to believe that all manufacturers in industry requiring large amounts of capital investment, are apt to, or willing to become parties to trust agreements with similar manufacturers; that there is ever present a union of capital in order to gouge the public purse, and the farmers, such as composed the jury in the instant case were no exception to the class of citizens above defined as the public. This letter, which makes direct charges and states the near results, attempts to state and show the results of a combination existing between cement manufacturers, necessarily had a decided influence on the minds of the jury in the instant case and necessarily biased and prejudiced the jurors against the defendants on trial, and although

the Court sought to exclude in its charge the evil of allowing the letter to be read, the harm was already done, the impression was created in the minds of the jurors—an impression not to be eradicated or overcome by the charge of the Court.

The instruction of the Court to the jury to disregard the alleged statements of fact in the letter was no more effective than would be the Court's order to the wind to cease blowing, or the waves to stop rolling in on the seashore. The harm was done, the impression created, and the command of the Court could no more eradicate the impression created in the minds of the jurors from the reading of such letter than could a child who has driven a nail in a piece of polished wood or furniture, cure the same by withdrawing the nail and stuffing the hole with breadcrumbs or putty. The wound or scar is there. The words of the Court in its instruction to disregard the harmful effect of the letter could no more erase the prejudice than a child could cure the wound or scar in the illustration given. The evidence was either proper or improper in the first instance. If improper and the trial court admits its impropriety by instructing the jury to disregard it, then the harm should have been cured by a new trial awarded by the lower court, or should be corrected by this Court.

It may be urged that the admission of this letter and the reading of the same should not cause a reversal because there was other legal evidence to support the verdict. In this connection we can only refer to the language of Judge Shelby in the *Consolidated Grocer Association* case, last above quoted, 175 Fed. 641-646, wherein the Court says:

“It is of course a sound principle that a judgment should not be reversed when the error complained of worked no injury. Referring to the application of this rule, in *Smith vs. Shoemaker*, *supra*, page 639, of 17 Wall. (21 L. Ed. 717), the Court said—‘It must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party. The case must be such that this Court is not called on to decide upon the preponderance of evidence that the verdict was right, notwithstanding the error complained of.’ The letter in question here bears so upon the issues joined that we cannot in view of other evidence in the record say that it was not injurious to defendants.”

Another instance similar in general scope to the admission of the letter to the Treasury Department, and the reading of the same to the jury, was the evidence regarding the action of the Washington and Northern California Cement companies, or some of these companies, in opposing the proposed action of the Spokane, Portland & Seattle Railway Company in putting in a rate upon cement from the Irwin plant near Spokane to Portland of  $13\frac{1}{2}\text{c}$ , which rate was not to apply to intermediate points, nor to apply in the opposite direction. We know of no reasons why persons engaging in any business may not combine to prevent any action of common carriers, which in their judgment may be prejudicial to their business and this principle is recognized in the general charge of the Court to the jury. Therefore, if the action of the several Washington companies and some of the Northern California companies



in using every means possible to prevent such railway company from establishing what in the judgment of such Washington and Northern California companies was an unjust and discriminatory rate, we cannot see upon what principle such evidence could be admitted to establish an unlawful agreement, combination or conspiracy between the cement manufacturers. In other words evidence of the combination between cement manufacturers to do a lawful act cannot constitute evidence of an unlawful combination or a combination to do an unlawful act. The evidence referred to was the evidence of C. F. Swigert referred to in exception 39, who testified that Portland quotations for cement in connection with the Interstate Bridge job were from \$1.75 to \$1.90 but that he secured a quotation from the International Cement Co. of Spokane, or Irwin, at \$1.65 delivered in Portland if the freight rate of 13½¢ per hundred pounds could be obtained from the railroad; that Mr. Coats of the Washington Cement Company advised him that he would protect the International price if he, Swigert, would not insist upon the rate going into effect; that the orders were thereafter given to the International in the first instance, but the cement was furnished by the Western Washington or the Northern California companies; also the evidence of W. D. Swinner, Traffic Manager of the Spokane, Portland & Seattle Railway Company, exception 74, wherein Mr. Skinner testified that the former rate was 25¢ per hundred pounds, between Irwin or Spokane and Portland; that he had agreed to put in a rate of 13½¢ for the Interstate Bridge job; that objection was made by Eden and Coats of the Western Washington plants to such rate going into

effect, and thereafter agreement had between the cement companies and cement for this job furnished by Western Washington and California cement companies, and Government Exhibits 38, 41, and 75, which refer to the contract between Pacific Bridge Co., and Superior Portland Cement Co., letters between the Superior Portland Cement Co. and its Vancouver agent, and telegrams passing between Muhs of the Northern California Co. and J. C. Eden and Coats of the Western Washington Co., and J. G. Woodworth, vice-president of the Northern Pacific Railway Company and Eden relative to the rate in question and the contract for cement for the Interstate Bridge. These letters, telegrams and the evidence submitted showed clearly that the Western Washington Cement plants and the Northern California plants were working in harmony to prevent this rate going into effect, and to prevent such rate going into effect they were willing to and subsequently did, sell cement to the Pacific Bridge Co. at less than the then prevailing market price in the city of Portland. It was perfectly lawful for these parties to get together in connection with this matter. A combination to do a lawful act—something the parties had a right to do. It was evidence of previous accommodations and actions prior to the entry of the Oregon Portland Cement Company, the plant officered by plaintiffs in error, into the manufacture of cement. Such evidence submitted to a trained legal mind such as that of the trial court or to this Court could have no possible harm or injurious effect with reference to the rights of plaintiffs in error. The case however was not to be tried by trained legal minds. The case was tried at a time when prices were

rising—when the public purse and mind were at the breaking point with reference to price advances, and willing to take any action to stop the steady advance of prices, which was far in excess of the rise in wages or the returns from farm products. At a time when the increased cost of any public work to be paid for by taxation would necessarily increase taxes, which were already advancing by leaps and bounds, not only due to the advance cost in local administration, but also to the increased taxes imposed by the Federal Government for war needs. Therefore, evidence of this character had a strong and decisive tendency in biasing the minds of the jurors and causing them to be not only willing but anxious to penalize any person which in any manner they could legally accuse of having any part in such advance prices, and although the action of the cement company was lawful, evidence of something they had a right to do, and the Court so instructed the jury in its final charge, the Court did admit such evidence in the case attempting to prove these plaintiffs in error guilty of a crime, and the jurors naturally concluded that such evidence was proper and that they had a right to convict thereon, or otherwise the Court would have excluded such testimony from the trial. It is true that in this instance, as in the instance in connection with the letter to the Treasury Department, the Court by its instructions sought to protect the rights of plaintiffs in error by instructions, but as previously stated, the harm was already done, the wound was there, and words could not efface it. Or to use the words of Watkins, Judge, in the case of *Stewart vs. Newby*, 266 Fed. 287-295:

“Whether the effect of the evidence thus improperly introduced may be subsequently removed by its exclusion and an instruction to disregard it, depends on the character of the evidence. This Court must take cognizance of the general recognition among the members of the bar, as well as by the Courts of the harmful effects upon minds of jurors of such testimony as was here sought to be introduced. The only purpose for which such evidence is presented is to prejudice the jury and the poison is of such character that once being injected into the mind, it is difficult of eradication.”

We admit that the general rule is that where the Court has erroneously admitted evidence during the trial, the error of its admission is cured by subsequent withdrawal before the closing of the trial, or by a clear peremptory instruction to the jury to disregard it, but as was said by the Court in the case of *Maytag vs. Cummings*, 260 Fed. 74-82, wherein Judge Sanborn after stating the general rule then comments:

“But there is an exception to this rule. It is that, where the appellate court perceives from an examination of the record that the inadmissible evidence made such a strong impression upon the minds of the jury that its subsequent withdrawal or the instructions to disregard it probably failed to eradicate the injurious effect of it from the minds of the jury, there the defeated party did not have a fair trial of his case and a new trial should be granted.”

The quotation above given was by Judge Sanborn in a civil action. The instant case is a criminal action



and one tried at a time when, as previously stated, the public mind was in such condition that it was hard for laymen to grant a fair trial to persons accused of a crime of the character of the one under examination under any circumstances. Therefore, could it be said by the trial court, or can it be said by this court, that the two instances above cited, that of the letter to the Treasury Department, which was read, making a positive and direct charge by parties not before the Court, not subject to cross-examination, a statement to which plaintiffs in error had nothing whatsoever to do, and the evidence relating to a combination of cement manufacturers to do a lawful act, which might or might not have a tendency to raise taxes, but which to the public mind would apparently cause an increase in the cost of a public project and a consequent raise in taxes, did not have a most decided effect upon the result of the trial of plaintiffs in error, or could it then be said, or can it now be said that the above evidence alone was not the controlling evidence upon which the jury decided the guilt or innocence of plaintiffs in error. There was no other evidence before the Court except of Aman Moore, who was discredited and apparently apologized for by the prosecuting attorney, and evidence that cement, a commodity like sugar, whether manufactured by Washington, Oregon, California, or any other company, possessing the same qualities and therefore necessarily sold at the same price, was sold at the same price by the Washington, Oregon and California companies.

Another class of evidence which comes under this general head includes various and sundry letters passing between the several Washington companies and per-

sons doing business in the State of Washington only. It covers letters written by several Washington companies to F. T. Crow & Co. of Seattle, to F. T. Crow & Co. of Tacoma, and letters written by Wylie of Aberdeen, letters written by Foster of Hoquiam, letters written by Bennett of Vancouver, and letters written by these several parties to the Washington cement makers. The Court in which this case was tried had only to do with violations of the Sherman Anti-Trust Act, an Act to protect interstate and not intrastate commerce or trade. If the attempted combination between the Washington cement manufacturers relating to business within the State of Washington only, was against the law, it was against the law of Washington only, and not against the Act of Congress, and any evidence of any combination or agreement between the Washington companies only, and relating to business within the State of Washington, whether legal or illegal in such State, was clearly incompetent to establish a violation of the Act of Congress, which relates solely and alone to interstate law.

Another class of evidence of the same general character are the letters relating to promotion work. It is admitted that cement companies have a right to combine for any legal purpose, and that the promotion of the use of the product of their mills is a lawful purpose. The National Portland Cement Association was an organization of cement manufacturers throughout the United States, formed for the purpose of fostering the use of cement throughout the country. This Association had nothing in the world to do with the business of any cement manufacturer; it did not pretend to regulate where

each manufacturer could sell the product of his mills, or at what prices should he sell the same. It was a voluntary association formed for promoting their own interest and as they viewed it, the common interest of all persons engaged in building. In this class may be considered letters passing between Eden and George and other letters, Government Exhibits 74, 76, 77 and 89.

The correspondence between George and Leonardt, Government Exhibit 105, and the letter from Henshaw to Butchart, Government Exhibit 89, we submit were both clearly incompetent. Neither of these letters tend to establish any agreement, combination, or conspiracy. The first of these letters merely expresses the views of the writer in regard to how manufacturers of cement should regard one another, and what action they should take toward one another. There is not a single statement contained in this correspondence which tends to show that either of the parties had entered into or intended to enter into any combination in restraint of interstate commerce. The second of these letters from Henshaw to Butchart makes no reference to any combination or conspiracy in restraint of interstate commerce. It contains a protest against the installing of a new cement plant in the territory adjacent to the Riverside plant, and asks the friendly assistance of Butchart in preventing this installation. The other refers to a scheme which Henshaw had and which he thought would probably put all cement companies out of business. He came to Butchart as his friend of long-standing explaining the character of this proposed enterprise, and what its effect, if successful, would be upon the cement industry on the coast. It was written after

the Riverside Company had withdrawn from Oregon and Washington. It makes no references to the causes which led up to this withdrawal. There is nothing in the letter from which any inference can be drawn that either the writer or the person to whom the letter was written had at any time been in any combination or conspiracy in restraint of interstate commerce or trade.

The trial court permitted the Government to introduce evidence to show that notwithstanding the fact the Oregon Portland Cement Company sold its product entirely to dealers, giving them special terms and really at lower prices than other cement companies charged for cement, the consumers paid the same price. This evidence was simply based upon the language of the indictment, but we submit this part of the indictment does not charge any violation of the law, as more fully shown in the argument previously submitted relating particularly to the indictment. No attempt was made to show that the Oregon Portland Cement Company undertook to fix a price at which dealers should sell cement, nor the territory in which the cement should be marketed, nor that these plaintiffs in error as officers of said companies undertook to fix such price or market. If consumers were deprived of the benefit of competition and were compelled to pay arbitrary prices for cement, the defendants on trial had nothing to do with this result. If the fact were true that the consumer paid the arbitrary price, it would have been a combination between the dealers and cement companies, other than the Oregon Portland Cement Co., a combination with which the Oregon Portland Cement Co., and the defendants on trial had nothing to do.



**ERRORS COMMITTED BY THE TRIAL COURT IN EXCLUDING EVIDENCE WHICH WAS COMPETENT AND RELEVANT AND HAD A TENDENCY TO EXPLAIN THE ACTIONS AND CONDUCT OF EACH OF PLAINTIFFS IN ERROR.**

Defendants offered in evidence when Aman Moore was on the stand, letter written by Wirt Minor to Aman Moore dated July 25, 1916, defendant's identification No. 12, and letter written by Aman Moore to Mr. Minor dated August 29, 1916, defendant's identification No. 13. These two papers were excluded by the Court upon the ground that they had nothing to do with the case. Other papers of the same kind are the telegrams dated July 27, 1916, addressed to R. P. Butchart, signed by C. Boettcher, R. J. Morse and Possett, and the conversation between H. A. Ross, Clark M. Moore and Wirt Minor in relation to matters set forth in these telegrams. The attention of Aman Moore was called to this conference and telegrams relating to the matters which were discussed and it was shown one of the telegrams was discussed at that conference. This evidence was offered for the purpose of impeaching Aman Moore and the defendants expected to show that at that time Aman Moore, notwithstanding the charges he had made against Butchart and Clark M. Moore, had agreed that the sales department should remain in charge of Clark

M. Moore, and that Butchart's powers as president should not be interfered with.

We submit that this testimony tends strongly to impeach the statements made by Aman Moore and which probably constitute the entire evidence in favor of the Government against these defendants. It impunes the good faith of Aman Moore and tends to show conclusively that Aman Moore was satisfied with the manner in which Clark M. Moore was conducting the sales department of the Oregon Portland Cement Company, at that time, and that the so-called facts related in his testimony were after-thoughts engendered from the bitterness created in his mind by the refusal of the stockholders and managers to allow his rule or ruin policy. This evidence was particularly important as there is no testimony that Clark M. Moore ever made an agreement or entered into any combination or conspiracy as charged in the indictment and the entire case rests on the manner in which he conducted his department, and this evidence tends strongly to show that no change had been made in the manner in which the sales department was conducted. Identifications 12 and 13 further impune the good faith of the witness Moore, for by these identifications he was called upon by the attorney for the company, who was one of the directors of the company, to produce evidence which he had to sustain the charges which he had made in his complaint of June 9, 1916.

ERRORS COMMITTED BY THE TRIAL  
COURT IN ITS CHARGE TO  
THE JURY.

Indictment in Count Two charges plaintiffs in error with monopolizing Interstate Trade and Commerce in the district of Oregon, and does not charge plaintiffs in error with monopolizing or attempting to monopolize Interstate Trade or Commerce either in California or Washington.

The charge of the Trial Court, however, was not so limited. We quote:

“Now the second count of the indictment as I have already said to you, charges the defendants with monopolizing the trade or commerce between the States in violation of Section 2 of the Act, which provides that all persons who shall monopolize or attempt to monopolize, or combine with any person or persons to monopolize any part of the trade or commerce of the several states, shall be guilty of a crime. To constitute the offense of monopoly under the Act, it is necessary to acquire exclusive right to such commerce by means which will prevent others from engaging therein.”

The reference in the Trial Court's charge is to the part of the charge which precedes, and is in the following language:

“The second count charges the same parties by means of the same arrangement and combination with monopolizing the trade in cement in these several States.”

The several States referred to are Oregon, Washington and California. It appears, therefore, that under

the charge of the Trial Court upon the second count of the indictment, the jury was instructed to try the defendants upon the charge of monopolizing trade in cement in Oregon, Washington, and California, whereas the second count limits the charge of monopoly to the State and district of Oregon.

If, therefore, the jury should have found from the evidence that the defendants on trial agreed that the California companies might have a monopoly of the cement business in the State of California, they could find the defendants guilty upon the second count, though the indictment charges them only with the monopoly of the cement business in the State and district of Oregon.

In the charge of the Trial Court, the Court stated that it is not charged that by the alleged agreement the Oregon companies' territory was limited to points north of Drain or Roseburg, or the Deschutes or the town of Umatilla on the east, and that the geographical points above mentioned were material in the case only as bearing upon the creditability of witness Aman Moore, who testified to an alleged conversation he had with Mr. Butchart, in reference to the division of territory, and that if the jury should find, from consideration of the whole case, that the defendants on trial became parties to an agreement excluding the Washington companies from Oregon, and the Oregon companies from Washington, and restraining or limiting competition in Oregon as between the Oregon and California companies, it would be justified in finding against the defendants.

We contend that so far as the defendant, Clark M. Moore is concerned, there is absolutely no evidence tending to show that at any time he knew of any alleged



combination or agreement between the California and Washington companies, and the Oregon company, or any of them.

Aman Moore does not testify that Clark M. Moore entered into such agreement, and no other witness does. On the contrary, Aman Moore testified that Clark M. Moore stated he would carry out no agreement made by Butchart or anyone else if such agreement was made which was in violation of the law, but would sell the product of the Oregon Cement Company wherever the freight rates would carry him.

Now Aman Moore testified he did not tell Clark M. Moore what Mr. Butchart told him—in other words, he testifies he told Clark M. Moore that the agreement was, so far as Oregon was concerned, limited to the geographical points defined by the Trial Court.

Clark M. Moore could only be convicted, as the Trial Court charged the jury, upon evidence showing that he became a party to the agreement or combination. He therefore could not become a party to any agreement or combination which was not limited by the geographical points defined by the Trial Court, and he could not be convicted upon the indictment unless it were shown that he became a party to the agreement, and that this agreement was limited to the geographical points defined by the Trial Court.

Again, in order to find the defendants guilty, or either of them guilty, it was necessary for the Government to show by evidence to the jury beyond a reasonable doubt, that Butchart and Clark M. Moore became parties to this agreement, which was alleged to have been

entered into in 1914 between the Washington companies and the California companies.

No effort was made to show that Butchart or Clark M. Moore were parties to this agreement at the time it was alleged it was entered into. All the testimony of the Government is to the effect that the agreement, so far as the California companies withdrawing from Washington is concerned, was made in 1913, or early in 1914, and so far as the Washington companies withdrawing from Oregon is concerned, was made in June or July, 1914, the Washington companies at that time being permitted to sell in Oregon north of Salem, and about the end of 1915 or first part of 1916, that the Washington companies would not sell in Oregon at all.

There is not a single particle of evidence tending to show that either of the defendants on trial had anything to do with the agreement or combination which is alleged to have been made in 1913 or 1914.

Every witness on behalf of the Government who testified upon this subject states that the California companies practically gave up business in Washington early in 1914, or prior to that time, and that at or about that time the Washington companies agreed to do no business in California, and none in Oregon south of Salem.

The trial court charged the jury that the relationship of Mr. Butchart to the Portland Cement Company prior to the formation of the Oregon Portland Cement Company, and his activities in connection with the plant at Oswego under both corporations might be taken into consideration.

It is admitted that Mr. Butchart was not an officer of the Portland Cement Company, nor a director in said corporation. There is no evidence that he had anything to do with the policy of that corporation.

The only evidence relating to this matter is found in the letters between Aman Moore, the President of the Portland Cement Company, and Mr. Butchart, written in 1914, and in the spring and summer of 1915. These letters are Exhibits 82, 83, 84, 85 and 86. There is no controversy in regard to the date of the formation of the Oregon Portland Cement Company. It was not formed until August, 1915.

It is conceded that until certain conditions were complied with, conditions created by a Mr. Boettcher, and until Mr. Boettcher should become satisfied with the situation and pay for his stock, the Oregon Portland Cement Company could have no existence, and it was contemplated in the event that the conditions should not be fulfilled, that the Portland Cement Company should liquidate. Its charter had already been forfeited for the failure to pay its license fees.

We submit that these letters do not warrant or form any basis for this charge. The first of such letters is dated September 4, 1914. It suggests that all subscribers will be glad to let matters stand until the war is over. In this letter Mr. Butchart enclosed a letter which he had written to Boettcher, which Boettcher letter reviews conditions, and expresses the opinion of the writer that the advent of the plant at Oswego would not affect the market unless such plant should cut prices.

The second letter is dated May 14, 1915, in which Butchart suggests to Aman Moore that when the Os-

wego plant should enter the market, its attitude should be to leave matters as they were, and say nothing of the peculiar advantage of the Oswego plant, and nothing derogatory of other manufacturers—in other words, the suggestions in such letter are in line with the Trial Court's charge wherein the Court said—

“A manufacturer may offer his product for sale at the same price and on the same terms, and in the same territory as competitors, and not be guilty of a violation of this statute.”

and particularly with that portion of the trial court's charge wherein the court says:

“If, however, at the time the Oregon Company was ready to market its products it found an established price for cement made by its competitors, it had a right, without violating the law, to conform thereto and sell its product at the same price or to confine its operations to any certain or particular territory.”

The next letter is dated May 16, 1915. This letter relates entirely to the Columbia Highway contract, and suggests that before Aman Moore should make a price to a contractor he should discuss the subject of price with Mr. Coats. The contract referred to was to be performed, in part at least, in 1915, and it was known when such letter was written that the Oswego plant could not supply cement for that year from its plant, but must obtain such cement from some other maker, and it seemingly was contemplated that the Company represented by Mr. Coats should supply the cement. There-



fore, it was proper, before making a price, to consult with the representative of the Company who was to supply the article.

This statement applies with equal force to the letter of May 22, 1915. The last of these letters is dated June 14, 1915, and relates entirely to the Columbia Highway contract. In none of these letters is there any intimation or statement that Mr. Butchart was in any respect active in the management or control of the Oswego plant, or taking any particular interest therein except to express his willingness to deposit his check to cover his subscription provided he should be allowed interest on the amount pending the time the old company should be re-organized.

We submit that there is no evidence showing that Mr. Butchart did anything in 1914 or 1915 toward determining the policy to be pursued by the Oswego plant when it should come into operation, but as a possible subscriber and stockholder he contented himself with generally expressing his views in letters of advice to Mr. Aman Moore, the President of the Portland Cement Company. Therefore, there was no evidence upon which the instruction under discussion could possibly rest. Such instruction assumes a state of facts not established by the evidence. The portion of the charge quoted in connection with the letters were correct statements of the law, but we cannot say whether the jury were guided by such statements, or listened more particularly to and were guided by the erroneous instruction now under discussion. The letters in evidence were certainly entirely consistent with the innocence of the defendants.

A further instruction was given by the Trial Court in regard to the last letters commented upon. This latter instruction refers to the letters just commented upon, and also to those passing between Mr. Butchart and Mr. Aman Moore subsequent to the formation of the Oregon Portland Cement Company, and prior to the date on which Clark M. Moore became sales manager of the company. It covers Exhibits 82 to 96, both inclusive.

The evidence shows, without contradiction, that Mr. Butchart was made President and Director of the Oregon Portland Cement Company on December 21, 1915. The letters show that he was not in Portland between December 23, 1915, and March 31, 1916, and that he did not return to Portland before April 10th or 11th, 1916. The letters show that the first suggestion in regard to having some understanding with competitors was made by Aman Moore in his letter of December 23, 1915, in which he suggests that the general policies of the company in handling sales should be outlined and arranged by Mr. Butchart so far as dealings with competitors are concerned.

The answer to this letter, dated December 29, 1915, clearly shows that Butchart had not had any agreement or understanding with any competitors. He gives his opinion that no prices should be quoted until this matter had been gone into with the California and Washington makers; that the price should be the same in Portland as in Seattle, San Francisco and Tacoma, and that it will be difficult for the Oregon company to secure the Seattle, San Francisco, and Tacoma prices unless it were permitted to name the price for Oregon, and that some

understanding should be arrived at whereby the Oregon company might be assured of disposing of the output of the one kiln plant.

He further suggests that this would require careful handling, but that he was in hopes it could be done; that he would meet some of the Washington makers and impress upon them the views of himself and Aman Moore, and that he thought it best that Mr. Aman Moore should leave these matters in his hands.

This correspondence shows conclusively that at the time the letter was written Mr. Butchart had done nothing to have any understanding with any cement manufacturer, and that he did not wish Aman Moore to have any understanding with any cement manufacturers.

The correspondence up to this point shows that no agreement or combination or conspiracy had been entered into, or attempted by Mr. Butchart.

On December 31st, 1915, Aman Moore wrote a letter to Mr. Butchart, acknowledging the letter of Mr. Butchart of December 29th, 1915, in which he says he believes that Butchart, with his acquaintance and friendship with the Washington and California cement makers will be able to establish a market for the Oregon product without cutting prices, and suggests that he take the matter up with Coats.

The next of these letters is February 11th, 1916, addressed to Mr. Butchart, and written by Mr. Aman Moore, but this letter contains no suggestion in regard to any action to be taken by Mr. Butchart in connection with other cement makers. If such letter was answered, the answer is not in evidence, and as the Government

was furnished with all of Mr. Aman Moore's files, we must therefore assume that no answer was made to this letter.

Aman Moore wrote another letter to Mr. Butchart dated February 12th, 1916. This letter was acknowledged and answered on February 15th, 1916—See Exhibit 92. From the answer it would appear that the letter related entirely to the sale by Aman Moore of a part of his stock, and that the only parties to whom he thought the same could be sold were Henshaw and Coats.

The next letter by Butchart to Aman Moore was written February 21st, 1916—Exhibit 93. It acknowledges the letter written by Aman Moore to Mr. Butchart, dated February 17th, 1916, but this letter is not in evidence, and we can only judge of its contents from the answer. Seemingly it related entirely to a suggestion that Mr. Butchart should see the Purchasing Agent of the Southern Pacific with view to selling the Southern Pacific its cement requirements in Oregon; and that it was contemplated the Southern Pacific would pay the Oregon Company the same price for cement in Oregon which it paid the California Companies for cement in California.

The next letter is dated March 2nd, 1916—Exhibit 94, written by Mr. Butchart to Aman Moore. It acknowledges the letter of Aman Moore dated February 28th, 1916. It does not contain anything which might tend to show that any combination or agreement or conspiracy was entered into or contemplated. On the contrary the letter states that the Company was not ready to make quotations to anyone.



The next letter is from Aman Moore to Mr. Butchart, dated March 6th, 1916, Exhibit 95. This letter also relates to contemplated sale of cement to the Southern Pacific, and tells what the writer has done with relation to sales. It conclusively appears from this letter that on March 6th, 1916, nothing had been done by Butchart or by Aman Moore toward an agreement, understanding, combination or conspiracy with other cement makers, for in this letter Aman Moore advises he had received orders from the best dealer in each town, including Roseburg, Dallas, Salem, Pendleton, and others, with the understanding that the price should meet competition, and that with this understanding these dealers were to drop other companies and represent the Oregon Company alone. This letter was answered by Butchart by letter dated March 14th, 1916—Exhibit 96, in which he states he has seen the Southern Pacific Purchasing Agent and says:

“Some of the Washington makers will be here Friday, and I expect we will have something definite next week. In the meantime it would be just as well to forego any expenditures in the way you suggest.”

The expenditures referred to were in relation to the letter of Aman Moore of March 6th, 1916, wherein Aman Moore had suggested printing a pamphlet and canvassing the territory.

There was nothing in any of the letters in question which tended to show any agreement or combination had been made, or any conspiracy had been entered into by Mr. Butchart with the California or Washington cement makers of any kind whatever, and no inference

that such combination, agreement or conspiracy existed could be drawn from any of such letters.

As a matter of fact, the letters negated the idea that there was any agreement, combination or conspiracy, and therefore could not be regarded as evidence against Mr. Butchart. The letters were entirely consistent with his innocence, and repeatedly throughout the charge of the trial court, the Court told the jury that unless there was some agreement or combination made with one or more of the cement manufacturers by Mr. Butchart, or by Clark M. Moore, neither of these parties could be found guilty; that such an agreement might be found from their actions—that is to say, the manner in which the business was conducted—from what was done, and not what was contemplated.

An illegal agreement, combination or conspiracy, therefore, could not be proven or established by these letters, nor could it be inferred from such letters, for they positively negated any such understanding or conclusion.

We submit, therefore, that it was error on the part of the trial court to say to the jury that these letters were evidence against Mr. Butchart. They were not evidence against Clark M. Moore, for he was not Sales Manager, had nothing to do with, and no interest in the Oregon Company, and was not in a position to make any agreement, or to act on its behalf.

If Clark M. Moore was to be found guilty, he must be found guilty upon what occurred after he became Sales Manager from his actions, and from his actions alone. The instructions of the Court, however, left the jury the power to predicate guilt upon the letters alone.

The jury indeed was instructed by the trial court that they might find the defendant Butchart guilty upon the letters alone without any proof that he actually entered into any agreement or combination, or conspired with the other defendants, or any of them.

The statute does not make it a crime for a party to consider the advisability of entering into an unlawful agreement, combination or conspiracy in restraint of interstate trade or commerce. He must actually enter into such combination, or make such agreement and become a party to such conspiracy before he may be said to violate the law, and none of these letters indicate that Mr. Butchart did enter into any agreement or combination, or into any conspiracy with anyone in violation of the Sherman Anti-Trust Law.

If the letters are given full force and effect, and the worst possible construction placed upon them, all that can be said for such letters, viewed in this light, would be that Butchart was contemplating the advisability of entering into such agreement, and did not wish Aman Moore to compromise him, or compromise the Oregon Portland Cement Company by doing anything to bring about such an agreement, combination or conspiracy, or to enter into any such agreement, combination or conspiracy.

The indictment charges all the defendants with making an agreement, combination, or forming a conspiracy in violation of the Sherman Anti-Trust Law, and that such agreement was made in 1914 prior to the date of any of the letters in question.

If the agreement was formed between the California and Washington Companies, it was formed in 1914, and

there is no evidence to connect either Mr. Butchart or Clark M. Moore with the violation of such agreement, and these defendants could only be convicted if it were shown that after the agreement, combination or conspiracy was formed or entered into by other defendants, Mr. Butchart and Clark M. Moore, or one or the other of them became parties to it.

The real question in the case was whether or not they did become parties to such agreement, combination or conspiracy, and we therefore submit that the letters were not properly in evidence, and that the instructions in relation thereto were erroneous, and prejudicial to these defendants.

In the charge to the jury the trial court told the jury that if it should find that Mr. Butchart had failed to deny or explain acts of an incriminating nature the evidence of the prosecution tended to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the circumstances in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have denied or explained the incriminating evidence, if there is any against him, he would have done so.

The trial court further stated that Mr. Butchart while on the stand testified that he did not make certain statements attributed to him by Aman Moore, but said nothing about the letters written by him to Aman Moore, nor did he say anything about the meeting in San Francisco referred to in these letters, or offer to explain any of the letters or any of the statements contained therein, and that the jury had a right to take this omission of the defendant Butchart into consideration.



This instruction was based upon the language of the Supreme Court in *Caminetti v. U. S.*, 242 U. S. 470. This was a White Slave case. It appears that the girls had given evidence incriminating the defense. Evidence of matters which they had testified were within the defendant's knowledge, and the opinion of the court is clearly based upon this condition.

In the *Caminetti* case, on pages 494 and 495, the Court says:

"There is a difference of opinion expressed in the cases upon this subject, the Circuit Court of Appeals in the Eighth Circuit holding a contrary view, as also did the (454) Circuit Court of Appeals in the First Circuit."

*Balliet v. U. S.*, 64 C. C. A. 201, 129 Fed. 689;  
*Myrick v. U. S.*, 134 C. C. A. 619, 219 Fed. 1.

We think that the better reasoning supports the view sustained in the Court of Appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (Act of March 16th, 1878, 20 Stat. Atl. 30, Chap. 37, Comp. Stat. 1913, Sec. 1465), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and evidence already in evidence, in which he participated, and concerning which he is fully informed, without suggesting his silence to the inferences to be naturally drawn from it.

The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls when he took the witness stand

in his own behalf. He voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of these things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so without the fair inference which would naturally spring from his speaking only of those things which would exculpate him, and refraining to speak upon matters within his knowledge which might incriminate him.

The instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence, must be read in connection with the statement made in this part of the charge which clearly shows that the Court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances and intent with which that trip was taken; and the jury was told that it had a right to take into consideration that omission.

The court did not put upon the defendant the burden (495) of explaining every inculpatory fact shown or claimed to be established by the prosecution.

The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge, and as to events in which he was an active participant, and fully able to speak when he voluntarily took the stand in his own behalf.

It is clear from this language that the instruction was held to be correct only because it appeared that evi-

dence had been drawn in the case tending to show the guilt of the defendants, and evidence of facts of which the defendants were cognizant, and of which they had full knowledge, and that without such evidence the instruction would have been erroneous.

It is a familiar principle that a defendant is not compelled to meet allegations in the complaint which are not supported by any evidence. He must only meet the evidence which is introduced. It therefore behooves us to ascertain whethere there was any evidence introduced which the defendant Butchart was compelled to meet.

It is true that the letters written by Mr. Butchart to Aman Moore were in evidence, but there was nothing in these letters which Mr. Butchart was called upon to deny, and nothing in these letters which he was called upon to explain.

We have commented in the preceding paragraphs upon practically each and every letter introduced in this connection, and shown that there is not a single letter tending to establish guilt of these defendants.

It is the province of the court to construe instruments in writing, and not the province of the jury, and a rule of evidence well established, that where the writing is itself clear, no parol evidence can be given which would vary or contradict the clear language of the written instrument.

As we have shown, there is nothing in these letters that show that any meeting was ever held, or that anything was ever done by Mr. Butchart. He therefore could not be called upon to say anything about the "meeting in San Francisco" referred to in these letters.

Indeed the evidence conclusively shows that if there was any meeting in San Francisco between any of the parties of the accused, Mr. Butchart was not at any such meeting, and was not advised of anything which took place at such meeting. In other words, the evidence of the Government conclusively established that whatever took place at any meeting in San Francisco or elsewhere, if any such meeting was held, was not with the knowledge of Mr. Butchart, and he could not therefore be called upon to say or explain any evidence of such alleged meeting, and therefore no inference could be drawn against him because of his failure to say anything about such meeting, or to explain anything in regard thereto.

The indictment was defective and the demurrer should have been sustained, but failing in this the objection of these defendants to the introduction of any evidence in this cause upon the ground that the indictment did not state facts sufficient to constitute a crime was proper and such objection should have been sustained.

The testimony introduced with reference to the letter or complaint made to the Treasury Department, and the testimony with reference to the Interstate Bridge



rate matter, and the other testimony herein commented upon and to which objection was most strenuously urged at the trial, was improperly admitted, prejudiced the rights of these defendants and prevented them from having a fair trial as guaranteed by the Constitution and laws of our country, and therefore the conviction of each of defendants should be reversed.

The exclusion by the trial court of competent testimony offered by defendants to explain or qualify their actions in connection with testimony offered by the Government was improper and prevented a fair and impartial trial to defendants.

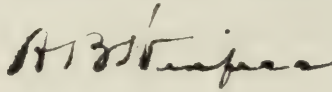
The errors committed by the trial court in its charge to the jury and in failing to give certain charges requested by defendants was grossly prejudicial to the rights of said defendants and prevented said defendants from having a fair trial.

Any one of the grounds above stated and commented upon are clearly sufficient to necessitate a reversal of the conviction of said defendants and it surely follows that when such numerous errors are committed as above pointed out and stated, that each of said defendants was prevented and denied a fair and impartial trial in accordance with the laws of this country and the proper rules of evidence, and therefore said defendants are entitled to a reversal.

Respectfully submitted,

TEAL, WINFREE, JOHNSON & McCULLOCH,

*Attorneys for Plaintiffs in Error.*

A handwritten signature in dark ink, appearing to read "H. B. Teal". The signature is written in a cursive style with a large initial "H" and a prominent "B".

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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R. P. BUTCHART and CLARK M. MOORE,  
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,  
Defendant in Error.

---

**BRIEF OF DEFENDANT IN ERROR.**

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Upon Writ of Error to the District Court of the  
United States for the District of Oregon.

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JOHN S. COKE,  
United States Attorney for Oregon.

LESTER W. HUMPHREYS,  
Special Assistant United States  
Attorney for Oregon.  
For Defendant in Error.

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No. 3919.

**United States**  
**Circuit Court of Appeals**  
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R. P. BUTCHART and CLARK M. MOORE,  
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**STATEMENT.**

The manufacture and sale of cement in the states of California, Oregon and Washington, until 1916, was carried on chiefly by nine companies. Sixteen of the officers of these companies are named as defendants in the indictment. The Oregon Portland Cement Company was the last to enter the field.

Prior to August, 1914, three western Washington and five California companies were in active competition. They then entered into an arrangement allotting

the territory among them. Washington companies were given the state of Washington, and shared Oregon, north of Salem, with the California companies. Oregon, south of Salem, and the state of California, became exclusively the territory of the California companies. The price of cement in Washington was fixed by the Washington companies. California companies fixed the price for Oregon and California.

Organization of the Oregon company began as early as 1909, but it did not come into the market with cement until the spring of 1916. About this time the previous arrangement was so modified that the Washington companies withdrew from Oregon, the Oregon company agreed to stay out of Washington and California, and the price of cement in Oregon was fixed by the Oregon company. The indictment was returned in October, 1916.

Of the sixteen officers who were indicted, seven entered pleas of guilty on behalf of the eight companies of which they were officers, and these seven defendants were fined. Seven other individuals were officers of the same companies as to which pleas of guilty were entered, and the indictment was dismissed as to them. When the case was called for trial, there remained only the two defendants who are plaintiffs in error here. The case was tried twice, first in October, 1919, resulting in a disagreement; and again in December, 1920, resulting in the judgment of conviction here for review.

The proof was a combination of direct evidence, letters and facts showing the course of dealing of the several companies. There was direct evidence by the defendant Coats, president of the Washington Portland Cement Company, to the effect that in July, 1914, at a conference at San Francisco, the cement

men agreed that the coast territory should be divided by giving Washington to the Washington companies and allowing them to fix their own price; allowing the Washington companies to sell in Oregon as far south as Salem, but at prices fixed by the California companies; and giving the California companies all of Oregon south of Salem, and all of California.

This was supplemented by a mass of letters, showing among other things the following: a California company notified a dealer at Aberdeen, Washington, that it could not take cement orders in Washington, but solicited the continuation of lime and plaster orders; a California company had a request from Bellingham, Washington, for quotation on cement, and in response to a telegram asking for authority to quote \$2.40 per barrel, which was 10c higher than the price of the Washington mills, the California company wrote its representative:

“As we understand that the present list price of the Washington mills is \$2.30 f. o. b. Bellingham, we have telegraphed you that it is quite in order for you to quote as you desire, and if the business is received by us on this basis, we shall certainly be glad to fill it.” (Ex. 117; Ex. 70. Trans. 593, 656).

The Superior (Washington) Company wrote to Balfour Guthrie at Portland as follows:

“My understanding of the arrangement with the California companies in Oregon is that the Washington companies after the first of the year should stay north of Salem. I wish you would let me know if my understanding of this is right.” (Ex. 59, Trans. 587.)

The same company wrote to its representative at Tacoma:

“Referring to our telephone conversation of this morning, in the matter of the bids for the 300 barrels required by the State Training School at Chehalis, it was agreed among ourselves that this order should come to us. We are consequently putting in a bid of \$1.85½ the same as we did last time, the Washington \$1.87½ and Balfour Guthrie \$1.90. We would prefer that you do not bid on this at all, but if you do, kindly bid slightly above us.” (Ex. 56, Trans. 583.)

Defendant Butchart since 1913 was a stockholder in the amount of \$100,000 in the Washington Portland Cement Company, of which defendant Coats was president.

The building of the cement plant at Oswego, Oregon, now operated by the Oregon Portland Cement Company, was projected as early as 1909. When the plant was partially completed, building was arrested for further financing. It survived various vicissitudes, and passed through at least one reorganization, when the present company succeeded the Portland Cement Company. Defendant Butchart was financially interested in the project as early as 1910, and became a director of the present company in December, 1915.

Touching the modified arrangement of 1916, which cleared the way for the Oregon company to market its product, the evidence showed renewed conferences of the defendant cement makers. There was direct testimony by Aman Moore, who was the first sales manager of the Oregon Company, to the effect that defendant Butchart, after returning from California early in 1916, said to Moore (who is not a relative of defendant Clark M. Moore) that Butchart had conferred with Washington and California makers at San Francisco in March, 1916, and they



had agreed to limit the territory of the Oregon company, which was not to ship cement east of Umatilla. There were also letters from Butchart to Aman Moore over a period of a year prior to the time when Oregon cement came on the market, from which the following are taken:

May 22, 1915. "Think it will be best that you arrange price with Mr. Coats, and hope price will not be too low. \* \* \* In future would leave Mr. Nickerson severely alone, and anything of importance we can take up direct with Mr. Coats." (Ex. 85, Trans. 621.)

June 14, 1915. "Our company above all others has an object in keeping prices up. There is no reason for cement selling lower at Portland than at San Francisco and Seattle, and I think I can aid in effecting this." (Ex. 86, Trans. 622.)

December 29, 1915. "We will be unable to quote prices on any quantity until we have gone into the subject with the California and Washington makers. Unquestionably the price should be the same at Portland as at Seattle, San Francisco and Tacoma. \* \* \* It will be difficult for us, a new company, to secure the higher price unless we are permitted to name the price at which cement is to be sold in Oregon. An understanding should be arrived at whereby we are assured of disposing of the output of a 1 kiln plant. To obtain this will require careful handling, but I am in hopes it can be done. \* \* \* I must be in Toronto on the 10th and propose returning home by way of San Francisco toward the end of the month and if necessary will try and arrange to have some of the Washington makers meet me there, to go into the whole sub-

ject, and as I am in very close touch with some of the makers, I think it better that you leave this entirely in my hands for the present." (Ex. 88, Trans. 624.)

February 15, 1916 at Del Monte. "I hope to see Mr. Hinshaw and Mr. Coats shortly. I have arranged to go to San Francisco on the 17th. \* \*\*" (Ex. 92, Trans. 637.)

March 2, 1916 at Del Monte. "I note what you say regarding pushing sales and am quite as anxious as you that we should get busy on the sales end, but we are not ready to make any quotation to any one. Don't worry. Have you named any price for the carloads you have sold?" (Ex. 94, Trans. 638.)

March 14, 1916, at San Francisco "I can quite understand your impatience to push sales. Some of the Washington makers will be here Friday. I expect we will have something definite next week. In the meantime just as well forego any expenditures in the way you suggest." (Ex. 96, Trans. 642.)

March 31, 1916, at Los Angeles. "I learn with regret that you have recently had Mr. Hollister in Washington soliciting business for our company. This in the face of a request that you do nothing in this respect other than to advise the trade by circular letter that Oregon cement will be on the market in April.

"You assured me that you would do nothing further than this. I would ask you again to leave sales alone for a time, and I have written Mr. Newlands to confer with you regarding some other position in the works for Mr. Hollister."

(Copy of letter of same date to Mr. New-

lands): "Mr. Hollister has been doing things he should not do at Walla Walla, Washington, and Baker, LaGrande and Pendleton, Oregon, and although Mr. Moore is responsible for this, I do not see that we require Mr. Hollister's services further in connection with sales.

"If you can find anything else around the plant that he can do and make himself useful you might arrange to retain him, but if you can not do so profitably you would better ask for his resignation." (Ex. 97, Trans. 644.)

Defendant Butchart returned from California to Portland in April, 1916, and immediately Aman Moore was displaced as sales manager by defendant Clark M. Moore, who had been brought from Denver by Mr. Butchart for that purpose. This was done at the insistence of the Washington cement makers. Mr. Butchart told Aman Moore (so Moore testified) that Washington makers had complained bitterly about the soliciting of business in Washington for the Oregon company by Mr. Hollister, and insisted on Aman Moore's removal.

Aman Moore then testified that he told Clark M. Moore about the agreement dividing territory and fixing prices, and that Clark M. Moore assured the witness that he (defendant Moore) would not carry out such an arrangement. However, the business of the Oregon company was conducted by defendant Clark Moore in compliance with the arrangement. Requests from points in Washington for quotations were avoided (Ex. 80, Ex. 103), or if a quotation was made, it was only after defendant Clark Moore had telephoned his co-defendant Eden at Seattle to learn their price, (Trans. 128-131) and then quoted a price higher than the Washington makers were quoting

(Ex. 72-73), and a price (\$2.68 per barrel f. o. b. Seattle) which, allowing for freight, was higher than the Oregon company was selling at in Portland.

Upon the advent of the Oregon cement upon the market, Oregon dealers were no longer able to obtain Washington cement; and the price they had to pay for Oregon cement was higher than they had previously been paying for Washington cement (Trans. 220).

In June, 1916, a suit was brought by Aman Moore in the Circuit Court of the State of Oregon in his own name and that of the Oregon Portland Cement Company, against all the companies involved in this indictment and others, as well as a number of individuals charging the existence of a combination in restraint of trade. This led to dissention in the Oregon Company, there were investigations by stockholders and directors, and feeling against Aman Moore developed in certain quarters. The defense sought to prove the findings of these investigators, and assign as error the rejection of the evidence.

Part of the strategy of the defense at the trial of this indictment was to attack Aman Moore. It was asserted by counsel for defendants Butchart and Moore that the prosecution had been instigated by Aman Moore; that he was responsible for it and assumed control over it to the extent of offering to have the indictment dismissed. This was reiterated before the jury, and to meet this contention, the government proved that the original complaint was made to the Treasury Department in February, 1915, by three dealers in Aberdeen, Washington. (Ev. p. 24, Ex. 40.) The admission of this exhibit is assigned as error and argued in appellants' brief.

The fifty-two assignments of error recited in the



brief (the transcript contains 115 assignments of error on behalf of Butchart and 77 on behalf of Clark Moore) are divided by appellants into four groups. For convenience we will follow this classification:

First: the indictment.

Second: the admission of evidence.

Third: the exclusion of evidence.

Fourth: instructions given and refused.

## POINTS AND AUTHORITIES.

### I.

Any combination, the necessary effect of which is to stifle or restrict free competition, is unlawful.

United States vs. Union Pacific Coal Co., 173  
Fed. 737-739.

### II.

The criterion whether a combination is unlawful is its effect upon interstate trade, which need not be a total suppression; it is enough if the necessary operation of the combination tends to restrain interstate commerce and to deprive the public of the advantages flowing from competition.

United States vs. McAndrews et al, 149 Fed.  
823-833.

United States vs. Northern Securities Co., 193  
U. S. 197-327, 331, 332.

### III.

The natural effect of competition in its broad and legitimate sense is to increase trade. To suppress such competition restrains, hinders and obstructs trade within the meaning of the act.

United States vs. Trans-Missouri Freight Ass'n. 166 U. S. 290-337, 341.

United States vs. Joint Traffic Ass'n. 171 U. S. 505-577.

Addyston Pipe Co. vs. United States, 175 U. S. 211-244, 245, 246.

Swift & Co. vs. United States, 196 U. S. 375-397.

Standard Oil Co. vs. United States, 221 U. S. 1-59-62.

United States vs. American Tobacco Co., 221 U. S. 106-179.

#### IV.

A combination apportioning the territory to be served by the defendants, eliminating competition between them, is in restraint of trade.

Addyston Pipe Co. vs. United States, 175 U. S. 211-241.

Standard Sanitary Mfg. Co. vs. United States, 226 U. S. 20-50, 51.

United States vs. International Harvester Co., 214 Fed. 987-994.

Eastern States Lumber Ass'n. vs. United States, 234 U. S. 600-610 et seq.

#### V.

A combination having for its purpose the fixing of prices is unlawful.

United States vs. New Departure Mfg. Co., 204 Fed. 107-110 et seq.

United States vs. Whiting, 212 Fed. 466-471, 472.

National Cotton Oil Co. vs. Texas, 197 U. S. 115-129.

Miles Medical Co. vs. Park & Sons, 220 U. S.  
373-400-408.

## VI.

The public is entitled to the natural and free flow of interstate commerce along its accustomed channels. Dealers may not, by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.

Federal Trade Commission vs. Beech Nut  
Packing Co., 257 U. S. 449-453.

## VII.

If defendants combine to restrain the freedom of interstate commerce, the parts of the general scheme, although lawful in themselves, become parts of an illegal combination under the Federal Statute.

United States vs. Reading Company, 226 U.  
S. 324-352.

Swift & Co. vs. United States, 196 U. S. 375-  
396.

United States vs. Rintelen, 233 Fed. 793-799.

## VIII.

Few indictments are so skilfully drawn as to be beyond the hypercriticism of astute counsel, few which might not be made more definite by additional allegations; but the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged.

Sheridan vs. United States, 236 Fed. 305-311  
(9CCA).

Ex parte Pierce 155 Fed. 653.

## IX.

The test of the sufficiency of an indictment for unlawful restraint of trade is not that it might be more specific and certain, but whether it charges enough to put the defendants on notice of what they may expect to meet in the proof.

United States vs. American Naval Stores Co.,  
186 Fed. 593-595.

United States vs. New Departure Mfg. Co.,  
204 Fed. 107-111 et seq.

United States vs. Rintelen, 233 Fed. 793-795  
et seq.

Burton vs. United States, 202 U. S. 344-372.

## X.

Such an indictment need contain no more than a description of the method actually devised and adopted for the restraint of commerce.

United States vs. Swift, 188 Fed. 92-98.

United States vs. McAndrews et al., 149 Fed.  
823-825-830.

United States vs. Patten, 226 U. S. 525-538-  
540.

## XI.

An indictment for conspiracy to restrain interstate commerce need not set out the means by which the object of the conspiracy is to be accomplished.

United States vs. Norris, 255 Fed. 423, 424.

Boyle vs. United States, 259 Fed. 803-805.

## XII.

The term "monopoly" as used in the act, includes



the suppression of competition by unification of interest. A monopoly exists even if the immediate effect is not to create a complete monopoly. It is sufficient if it tends to bring about that result. The decisive question is whether or not the power exists, not whether it has been exercised.

American Biscuit Co. vs. Klotz, 44 Fed. 721-725.

United States vs. Keystone Watch Co., 218 Fed. 504-517.

United States vs. Trans-Missouri Freight Ass'n., 166 U. S. 290-336.

Addyston Pipe Co. vs. United States, 175 U. S. 211-237.

Standard Oil Co. vs. United States, 221 U. S. 1-51-59, 61, 62.

National Cotton Oil Co. vs. Texas, 197 U. S. 115-129.

### XIII.

An exception to an instruction to a jury which does not point out the particulars in which the instruction is claimed to be erroneous, furnishes no basis for reversal.

Hammond vs. United States, 246 Fed. 40-47.

Jones vs. United States, 265 Fed. 235-241.

### XIV.

An accused who takes the stand in his own behalf may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence in which he participated, and concerning which he is fully informed, without subjecting himself to the inferences naturally to be

drawn from it, and justifying comment by the court in his charge to the effect that the jury may take this omission into consideration in reaching a verdict.

Caminetti vs. United States, 242 U. S. 470-493, 494; 220 Fed. 545-548.

### The Indictment

The objections to the indictment are threefold:

(a) That the facts stated do not constitute an offense.

(b) That the combination is not described.

(c) That the charge is too indefinite and vague to inform the defendants with reasonable certainty of the accusation against them.

(A) **Was the law violated?**

The first objection is that the facts stated do not constitute an offense against the laws of the United States. Let us see, briefly, what facts are stated. The indictment tells us that various companies, located in three named states, manufactured Portland cement for the general trade, and engaged in interstate commerce; that each of the companies had certain officers and agents, who are the defendants named in the indictment, and who were engaged in managing and directing the business of their several companies; that these persons have knowingly by concerted action carried on the business of their several companies without competition as to localities in Oregon, Washington and California, and by such knowing and concerted action excluded a southern California company from the cement trade in Oregon and Washington; excluded the other California companies from the cement trade in Washington; excluded the Washington companies from the cement trade in Oregon and California; excluded the Oregon company from

the cement trade in Washington and California; and required the northern California and Oregon companies to sell cement in Oregon only upon arbitrary and non-competitive prices, fixed and agreed upon between them in advance; and that by reason thereof, consumers of cement in Oregon, Washington and California have been denied the benefits of competition between the several companies and have been required to pay for cement, prices greatly in excess of the prices at which they would have obtained cement but for the combination.

Is such a state of facts prohibited by the statute? The act is terse: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal" (26 Stat. L. 209).

The facts stated in the indictment show that the defendants have by agreement and concert of action (1) apportioned among themselves the territory of the Pacific Coast in which they engaged in interstate commerce, part of them taking the state of Washington, part taking the state of Oregon and part taking the state of California; and each group taking its portion of territory to itself and to the exclusion of the others, and (2) fixed the prices at which cement should be sold.

This is just such a situation as the Supreme Court spoke of in *Addyston Pipe Co. vs. United States*, 175 U. S. 211-241, when it said:

"If dealers in any commodity agreed among themselves that any particular territory bounded by state lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business

in that territory, would not such an agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced (as it naturally would be) the character of the agreement would be still more clearly one in restraint of trade."

If this is a combination in restraint of trade, it is illegal. It is difficult to see how such an arrangement could have any effect other than to restrain trade, and to restrain it unduly and unreasonably. If it has that effect, then the indictment states an offense against the laws of the United States.

The reported cases nowhere approve such an agreement as wholesome or lawful. It is held that any combination, the necessary effect of which is to stifle or restrict free competition, is unlawful. *U. S. vs. Union Pacific Coal Co.*, 173 Fed. 737-739. The criterion whether any combination falls within the prohibition of the statute is its effect upon interstate commerce, which need not be a total suppression of trade; it is enough if its necessary operation tends to restrain interstate commerce and to deprive the public of the advantages flowing from competition. *U. S. vs. McAndrews*, 149 Fed. 823-833; *United States vs. Northern Securities Co.*, 193 U. S. 197-327, 331, 332.

The natural effect of competition in its broad and legitimate sense is to increase trade. To suppress such competition restrains, hinders and obstructs trade within the meaning of the act. *United States vs. Trans-Missouri Freight Ass'n.*, 166 U. S. 290-337-341; *United States vs. Joint Traffic Ass'n.*, 171 U. S. 505-577; *Addyston Pipe Co. vs. United States*, 175 U. S. 211-244, 245, 246.

Combinations to suppress, destroy, stifle or obstruct free competition between those engaged in



interstate trade are in restraint of such interstate trade. *Swift & Co. vs. United States*, 196 U. S. 375-397; *Standard Oil Co. vs. United States*, 221 U. S. 1-59-62.

A combination apportioning the territory to be served by the defendants, eliminating competition between them, is in restraint of trade. *Addyston Pipe Co. vs. United States*, 175 U. S. 211-241; *Standard Sanitary Mfg. Co. vs. United States*, 226 U. S. 20-50, 51; *United States vs. International Harvester Co.*, 214 Fed. 987-994; *Eastern States Lumber Ass'n. vs. United States*, 234 U. S. 600-610 et seq.

A combination having for its purpose the fixing of prices is unlawful. *United States vs. New Departure Mfg. Co.*, 204 Fed. 107-110; *United States vs. Whiting*, 212 Fed. 466-471, 472; *National Cotton Oil Co. vs. Texas*, 197 U. S. 115-129; *Miles Medical Co. vs. Park & Sons*, 220 U. S. 373-400-408.

The situation disclosed by the indictment is this: That in the three Pacific Coast states there was interstate trade in cement, practically all of which was carried on by the defendants as officers and agents in the direction and control of their several concerns; that by the combination among them the cement trade in California, which was of interstate character, ceased to be interstate trade and became intrastate trade; the cement trade in Washington similarly lost its interstate character and became intrastate trade; and the interstate cement trade in Oregon lost so much of its interstate quality as was derived from the participation therein of the Washington and southern California cement makers, while so much of interstate quality as remained to it was further restrained in its functioning by arbitrary and pre-agreed prices.

An indictment is not a mysterious document. No clairvoyant ability is required to read it. It is to be accepted as meaning what it fairly conveys to a dispassionate reader by a fairly exact use of English speech.

The public is entitled to the natural and free flow of interstate commerce along its accustomed channels. The buying public and all persons engaged in trade are entitled to the free opportunity to every dealer of approaching each and every prospective purchaser on equal terms, with the chance of making a sale if the dealer can persuade the purchaser to buy. When part of the dealers have by a combination been driven from their accustomed field, so that the remaining dealers have that field to themselves; and when that field is one where interstate commerce existed, and by the combination that interstate commerce has ceased to exist or has been largely diminished; then the law has been violated. We believe that the dispassionate reader, on the level of fairly exact use of English, will learn from reading the indictment that it states an offense against the Sherman Act.

In the case of Federal Trade Commission vs. Beech Nut Packing Company, 257 U. S. 449-453; 66 L. Ed. 307-313, the Supreme Court said:

“It is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural

flow of commerce in the channels of interstate trade.”

Defendants are not entitled to insist upon isolating a part of the indictment from its other parts, and separately considering the isolated part to determine whether therein is expressed a violation of the law. *United States vs. Patten*, 226 U. S. 525-544. If the entire instrument, taken together, considering each part in its proper relation to all the other parts, disclosed an offense, it is sufficient. In *United States vs. Reading Company*, 226 U. S. 324-352; 57 L. Ed. 243-252, it is said:

“But if the defendant carriers did \* \* \* combine to restrain the freedom of interstate commerce \* \* \* the parts of the general scheme, however lawful, considered alone, become parts of an illegal combination under the Federal Statute \* \* \* \*”

### (B) Describing the Combination.

It is argued that the indictment is bad for failure to give particulars of the unlawful combination.

The test of the sufficiency of such an indictment is not that it might be more specific and certain, but whether it charges enough to put the defendant on notice of what he may expect to meet in the proof. *United States vs. American Naval Stores Co.*, 186 Fed. 593-595; *United States vs. New Departure Mfg. Co.*, 204 Fed. 107-111; *United States vs. Rintelen*, 233 Fed. 793-795. Few indictments are so skilfully drawn as to be beyond the hypercriticism of astute counsel, few which might not be made more definite by additional allegations; but the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense in-

tended to be charged. *Ex parte Pierce* 155 Fed. 663; *Sheridan vs. United States*, 236 Fed. 305, 311 (9CCA).

An indictment charging a combination is sufficient when it alleges the ultimate plan—the result of concerted action together with specific acts by which the combination was carried out. It need have no more than a description of the method devised and adopted for the restraint of commerce. *United States vs. Swift*, 188 Fed. 92-98; *United States vs. McAndrews et al.*, 149 Fed. 823-825-830; *United States vs. Patten*, 226 U. S. 525-538-540.

As has been pointed out, the indictment charges that the cement makers grouped themselves, and assigned the Pacific Coast territory among the groups, each group taking its own allotment of territory to the exclusion of the others; and that they fixed and agreed upon prices for Oregon, which was assigned to a group composed of Oregon and California makers.

Referring to the language of the indictment, it is found to give particulars as to the method devised and adopted for the restraint of commerce in this language:

\* \* “That is to say, a combination, now here described, in restraint of, and which throughout said period of time has in fact restrained, said trade and commerce in the manner now here set forth: \* \* \* \* said defendants, so being in the active management, direction and control of the business and affairs of said concerns as aforesaid, in their said several capacities as officers and agents of those concerns, throughout said last-mentioned period of time unlawfully and knowingly \* \* \* have by concerted action carried on and conducted



said business of said concerns without any competition as to the localities in said states of Oregon, Washington and California in which they respectively sold cement, except as to said portion of said State of Oregon west of said Cascade Mountain range to the extent hereinafter indicated, \* \* \* \* and without any competition as to the prices at which they would respectively sell such cement in said State of Oregon west of said Cascade Mountain range as hereinafter specified, \* \* \* and unlawfully and knowingly have by concerted action prevented said southern California company from selling or consigning for sale its cement either in Washington or Oregon; \* \* \* said northern California companies from selling or consigning for sale cement in Washington; \* \* \* said Washington companies from selling or consigning for sale their cement either in Oregon or California; \* \* \* and said Oregon company from selling or consigning for sale its cement either in Washington or California; \* \* \* and unlawfully and knowingly have by concerted action prevented said northern California companies and said Oregon company from selling or consigning for sale their cement in Oregon otherwise than upon arbitrary and non-competitive prices, fixed and agreed upon between them in advance of such sales and consignments for sale, etc.”

It is argued by appellants’ counsel that the indictment does not say whether the combination was consummated by a union of capital or skill. But the indictment shows that the combination was consummated by concerted action of the defendants in the management, direction and control of their concerns.

This is merely choosing other words to say that it was by a union of action and purpose in conducting their business that the combination was brought to consummation. If the means adopted were apt for the accomplishment of the forbidden thing, it is equally unlawful; and the indictment need only describe the means that were in fact devised and adopted for the restraint of commerce. In this case the means adopted was concerted action of the defendants in the management and direction of their companies; and the ends to which it was directed—the allotment of territory to the several groups and the fixing of prices—are particularly described.

The objections of defendants are overthrown by the case of *Eastern States Lumber Association vs. United States*, 234 U. S. 600-612, in which the Supreme Court said:

“But it is said that in order to show a combination or conspiracy within the Sherman Act, some agreement must be shown under which the **concerted action** is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.”

Counsel argue further that the indictment furnishes no facts from which the court can determine whether the restraint contemplated was undue or unreasonable. Let us see if this is so. The indictment tells the court that the defendants barred from the

state of Washington the cement makers of Oregon and California; that they barred from California the cement makers of Oregon and Washington; that they barred from the state of Oregon the cement makers of Washington and southern California; and that they prevented the sale of cement in Oregon by Oregon and northern California companies at any price other than one fixed and agreed upon in advance. That previously these companies had for ten years been selling cement in interstate commerce on the Pacific Coast.

Given this state of facts, can the court determine from them whether the restraint effected or contemplated was undue and unreasonable? We submit with confidence that the court can so determine.

We submit that the indictment states facts which lead inevitably to the conclusion reached by Judge Wolverton in passing upon the demurrer. (But it was Judge Bean who presided at the trial). Judge Wolverton said in his opinion (Trans. P. 29):

“This, to my mind states quite clearly the scheme and purpose of the combination. It descends to particulars, and no one need be misled into preparing his defense for something other than as alleged against him. The court knows what the charge is without the liability of misconception or mistake, and the defendants need not fear that another prosecution can follow after trial upon this indictment.

Apply the standard of reason, which counsel insist that we shall, and then inquire further whether there is an undue restraint of trade or commerce. The indictment does allege that, by reason of these things, the defendants were engaged in undue and unreasonable restraint of

trade. We may put this to one side as a conclusion. There is sufficient alleged, however, from which to deduce this very conclusion. The concert of action which implies a combination for marketing their cement in particular locations, and the direct agreement between them for fixing arbitrary and non-competitive prices for the sale of cement in Oregon, is sufficient to stamp their demeanor as in restraint of trade and commerce. Such a combination is without the elements or indicia of a wholesome agreement and can not so be characterized."

The maximum requirement for criminal pleading is that the indictment contain all the elements of the offense charged; that it furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and that it inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

To accomplish these ends, there is required a degree of particularity; not such particularity as will satisfy and silence counsel for the accused, but reasonable particularity—so as to fairly meet those maximum requirements. This is the doctrine of *United States vs. Cruikshank*, 92 U. S. 542, and *United States vs. Hess*, 124 U. S. 483. The true test, as said by Judge Gilbert in *Sheridan vs. United States*, 236 Fed. 305, 311, is not whether the indictment might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other



proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

In *United States vs. Patterson*, 201 Fed. 697, it is said:

"It would manifestly be impossible to set forth in detail each separate transaction and the names of the individuals engaged therein, by which these plans of operations were carried out, without producing a paper so voluminous as probably to warrant the court in striking it from the files of its own motion as needlessly encumbering the record. \* \* \* It would seem that the particulars for which the defendants call are matters of evidence which the government must produce when it attempts to prove the charges made by it.

These defendants are charged with a conspiracy. \* \* \* The defendants as officers and agents of the company were in control of its affairs as alleged. They knew the detail of dealings between that company and each of those concerns and the manner of treatment of them by the company as the agency through which the officers and agents controlled and operated and the methods of their respective absorption by said company. They must know whom to call in each to establish their defense. It seems to me they are advised of the nature of the charge against them quite sufficiently for them to make a defense. \* \* \* I think it meets the rule of particularity of time, place and circumstances." This case was reversed, but on different grounds, in 222 Fed. 599.

The Supreme Court spoke to the same effect in *Burton vs. United States*, 202 U. S. 344, 372, when it said:

“The averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused was not entitled to more, nor could he demand that all the special and particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and therefore, within the meaning of the Constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the accusation against him.”

Reverting again to the indictment, it is found to contain:

1. . . **A description of the trade and commerce restrained.** It shows that for more than ten years in the states of California, Oregon and Washington cement has been manufactured, marketed and generally used; also that this trade had been conducted by the companies of which defendants are the officers and agents, with a designation of the state in which each factory is located.

2. **Facts showing that it was interstate trade and commerce.** It is alleged that the companies have sold large portions of the cement produced by them in others of said states (California, Oregon and Washington) than the state wherein the cement was produced and “that in pursuance of such sales \* \* \*

said concerns respectively have been continually shipping said cement to such consumers, dealers and agents in **such other states**" etc. (Trans. P. 10).

3. **The official relation of each individual defendant to his company**, and that such individuals "have been actively engaged, at said places of manufacture, in the management, direction and control of the business and affairs of the concerns with which they were so severally connected" (Trans. P. 11-12).

4. **That they engaged in a combination in restraint of said interstate trade and commerce** (Trans. P. 13). This is the only part of count one of the indictment, eight printed pages in length, which is in the language of the statute.

5. **A description of the method devised and adopted for the restraint of such commerce.** "Said defendants, so being in the active management, direction and control of the business and affairs of said concerns as aforesaid, in their several capacities as officers and agents of those concerns, unlawfully and knowingly have by concerted action carried on and conducted said business of said concerns" without competition as to territory and prices and effected the apportionment of territory among them and fixing of prices there detailed (Trans. P. 13-14).

6. **A statement that cement consumers have thereby been denied the benefits of competition**, and have been compelled to pay for cement arbitrary prices in excess of what they otherwise would have paid.

We confidently believe that the indictment meets every requirement of pleading and of the law.

In *United States vs. Norris*, 255 Fed. 423, 424 et seq. there was an indictment in some aspects similar

to the indictment here. A similar attack was made upon it. The court said:

"It is then alleged that \* \* \* defendants unlawfully and knowingly conspired together and engaged in a conspiracy in restraint of interstate commerce \* \* \* in the several ways and by the several means now here set forth and described: (1) By preventing the hauling of sand, etc., (2) by causing the sand, etc., to remain upon and in the cars in the possession of said railroad companies so transporting the materials to their destination which materials were then in interstate commerce 'said defendants planned and intended to prevent the delivery of said materials contained in said cars'. It also states that defendants did prevent such delivery; (3) By influencing and causing the persons employed to unload and haul the sand etc., not to do so \* \* \*. The only fair criticism is that the means or mode of operation do not appear in any way \* \* \*. The indictment purports to state the means by which the offense was to be carried out but does not give all the particulars. These however, are only the 'means' of executing the offense \* \* \*. It was the conspiracy which is denounced by the law, and that was complete when there was a meeting of minds to obstruct commerce. The motions in arrest of judgment should be overruled."

In *Boyle vs. United States*, 259 Fed. 803-805 (7 CCA) there was an indictment for combination to restrain trade. The court said:

"Plaintiffs in error contend that none of the counts set forth an offense under that statute; it being claimed, among other contentions, that the means by which the object of the conspiracy



or combination was to be accomplished are not set forth. Without considering the means that are set forth in the indictment, it is sufficient to say that the pleader was not required to set forth any means. Where the object of the conspiracy is unlawful as in this case, it is unnecessary to set forth the means by which the object is accomplished."

(C) **Is the Indictment Vague and Indefinite?**

What has heretofore been said is pertinent to this question. It would not be useful to repeat it. This objection must fall before the authorities and considerations which dispose of the preceding objection.

**Miscellaneous.**

There are a number of statements in appellants' brief about the indictment which may be noticed here.

Counsel say: "Neither in this part of the indictment nor elsewhere therein does it appear that any of the companies with which the defendants were connected were ever competitors." On pages 9 and 10 of the transcript are found these parts of the indictment "that during said ten years divers concerns, in the manner and under the circumstances in this indictment hereafter set forth, have engaged in such manufacture and in such sale of cement directly and indirectly to consumers \* \* \* (a list of the companies follows) that practically all of such cement consumed in said localities during the time aforesaid has been manufactured **by said** concerns; that said concerns, during said ten years, except as herein shown, have respectively sold large portions of the cement so manufactured by them to consumers of, and dealers in, such cement, whose several places of

consumption and business have been situated in others of said states than the one wherein said cement was so manufactured by said concerns respectively \* \* \* ” and that they had continually been selling and shipping cement from one state to the other.

Counsel isolate the two words “concerted action” and argue at length about their meaning and effect. The indictment is not to be construed by isolation of words and phrases and considering their meaning. The whole document must be construed together. The words “concerted action” must be considered as part of the entire sentence in which they occur. They are repeated in three clauses of a sentence of the indictment set forth on pages 13 and 14 of the transcript, as follows:

“Said defendants, so being in the active management, direction, and control of the business and affairs of said concerns as aforesaid, in their several capacities as officers and agents of those concerns, unlawfully and knowing have by **concerted action** carried on and conducted said business of said concerns without any competition as to the localities \* \* \* and without any competition as to the prices \* \* \*

“\* \* \* and unlawfully and knowingly have by concerted action prevented” the several companies from dealing in cement in the various parts of territory specified

“\* \* \* and unlawfully and knowingly have by concerted action prevented” the sale of cement in Oregon except at arbitrary and agreed prices.

This is all part of one sentence. All of it must be given effect. It describes concerted action, not as a general, indefinite expression, but a concert of action

of the defendants while in the active management, direction and control of the business of their companies; a concert of action by them in their several capacities as officers and agents of their concerns, by which they unlawfully and knowingly ("each then well knowing all the premises in this indictment aforesaid") performed their functions of carrying on and conducting their respective businesses without competition as to localities or prices, barred designated companies from designated territory, and required the sale of cement in Oregon at arbitrary and predetermined prices. Such a union of action and purpose to effect the ends they desired was as efficacious to restrain the trade in which they were engaged as would have been any union of skill or capital; and was well adapted to produce a result which the statute was designed to prevent.

Counsel devote some space in their brief to an argument that because cement is a heavy article, it is economically right to let a factory supply all the trade nearest it, and that an arrangement to accomplish this would not be an undue or unreasonable restraint of trade.

This argument, carried to its logical end, would bar California manufacturers from the state of Oregon. But the indictment discloses two conditions opposed to this (1) under the illegal combination the California factories shared Oregon with the Oregon factory, at an arbitrary and pre-arranged price; and (2) for ten years prior to the combination the cement makers were selling and continually shipping to other states than those in which their factories were located. So that the combination alleged was not one by which each state was to be supplied by its own domestic manufacturers, even if such a combination

could be regarded as reasonable and wholesome.

Counsel argue that "it is entirely legal for parties to agree upon and provide for a uniformity of prices" and in support of this position cite a case holding illegal a "combination between independent manufacturers and dealers for the purpose of at least destroying all competition between themselves" (*Texas Standard Co. vs. Adoue*, 83 Tex. 650, 657). It seems that further comment on this point is unnecessary.

Counsel argue that "the public has no right to unrestricted competition among all the persons engaged in any given business" citing *United States vs. Whiting*, 212 Fed. 475. The Supreme Court has expressed a different view, speaking through Mr. Justice Harlan:

"In the judgment of Congress, the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce." *United States vs. Northern Securities Co.*, 193 U. S. 197.

And the *Whiting* case, cited by defendants' counsel, holds that a combination having for its purpose the fixing of prices is illegal.

Objections are made that the indictment does not lay the venue, nor show the time of the acts charged. A reading of the indictment will show that these objections are without merit.

### **Count Two—Monopoly.**

What has been said heretofore applies largely to the demurrer to the monopoly count of the indictment. There remains the question whether count two states facts sufficient to charge a monopoly.

To monopolize trade signifies the combining or



bringing together into the hands of one person, or group of persons, the control, or power of control, over a particular business.

The term "monopoly" as used in the act, includes the suppression of competition by the unification of interest. A monopoly exists within the meaning of the act even if the immediate effect of the acts complained of is not to create a complete monopoly. It is sufficient if they tend to bring about this result. The decisive question is whether or not the power exists, not whether it has been exercised. *American Biscuit Co. vs. Klotz*, 44 Fed. 721-725; *United States vs. Keystone Watch Co.*, 218 Fed. 504-517; *United States vs. Trans-Missouri Freight Ass'n.*, 166 U. S. 290-336; *Addyston Pipe Co. vs. United States*, 175 U. S., 211-237; *Standard Oil Co. vs. United States*, 221 U. S. 1-51-59, 61, 62; *National Cotton Oil Co. vs. Texas*, 197 U. S. 115, 129.

It is not questioned that the allegations of count one may properly be referred to and adopted as part of count two.

The indictment asserts that for ten previous years, practically all the cement used in Oregon, Washington and California had been made and sold by the nine companies named in the indictment, each of such companies selling in others of said states than the state wherein it had its factory; that from August, 1914, to the finding of the indictment there was excluded from the state of Washington the Oregon and California companies, leaving in Washington only the Washington group of cement makers; there was excluded from California the Oregon and Washington companies, leaving in California only the California group of cement makers; there was excluded from Oregon the Washington and southern Cali-

for California companies, leaving in Oregon a group composed of Oregon and northern California companies, which group sold cement in Oregon only on arbitrary and agreed prices.

This shows the bringing together into the hands of a specified group of persons the power of control over the cement business in the states of California, Oregon and Washington. We submit that it constitutes such a monopoly as the statute intends to forbid.

Therefore the court ruled properly in holding the indictment sufficient.

## ADMISSION OF EVIDENCE.

### Exhibit 40—The Aberdeen Dealers Complaint.

Counsel first attack the admission of the letter of February 2, 1915, addressed to the Treasury Department, making complaint as to the situation in the cement trade.

In their brief, counsel have refrained from informing this court of the circumstances under which this exhibit was admitted. They argue its general admissibility, when its general admissibility has not been asserted. The real question is whether in the particular circumstances of its admission, and for the purpose for which it was admitted, the action of the trial court was proper.

It should be remembered that one of the features of the defense on which greatest stress was laid, was an attack upon the credibility of the witness Aman Moore. They carry this attack into this court by saying in their brief that Aman Moore "was discredited and apparently apologized for by the prosecuting attorney."

At the trial, upon the offer of the Aberdeen complaint (Ex. 40), a statement of its purpose was made as follows (Ev. P. 24):

"This letter is not offered, if the court please, as evidence of the facts stated in the letter, but it is material for this purpose: one of the charges made by the defense here is that this prosecution was instigated by Aman Moore; that Aman Moore was responsible for it, even to the extent at one time of offering to dismiss it. Now, this letter shows where this prosecution originated, and it is for the purpose of showing original complaint to the government, and to overcome their contention about Aman Moore being responsible for it, that this letter is introduced, and not as any evidence of the facts therein stated."

Court: "This is the same letter offered at the other trial, and admitted for that purpose alone."

Upon a renewed objection before the letter was read, the court further said (Ev. P. 25):

"No, the statement in the letter, of course, is not evidence of any facts in it other than that complaint was made; that is all. I think the jury will understand that."

Immediately upon the reading of the letter to the jury, the court again said to the jury: (Ev. P. 25)

"The jury will understand that this letter is introduced simply for the purpose of showing that complaint was made on this date, and is not to be considered by you as evidence of any facts stated in it."

Finally in the instructions, the court again impressed upon the jury the limited scope of the exhibit, saying (Trans. P. 465):

"You will recall that there was also admitted in evidence a letter addressed by certain dealers in Aberdeen, in the State of Washington, to one of the government departments, and you will also recall that at the time the letter was offered in evidence the court called your attention to the fact that it was not competent testimony of any of the facts stated therein, but only that a complaint had been made, and for that purpose it was admitted, but should not be considered by you for any other purpose."

The government at no time has asserted that this letter had any other than the limited effect shown by this record. It was carefully limited by the court, both before and after it was read to the jury, and again in the final instructions. It was not used by the prosecuting attorney for any other purpose than stated by him when it was offered.

It was used only to meet a situation produced at the trial by defendants counsel when they sought to discredit not only the witness Aman Moore, but the prosecution as well, by impugning the motives of the prosecution; assuming that it was not bona fide, but merely in the furtherance of the interests of Aman Moore, making it appear to the jury that the prosecution was one initiated by Aman Moore, and that the government was so concerned with his welfare as to allow him to offer to dismiss the prosecution. When defendants' counsel, in open court during a trial, claim that the government is in effect the tool of an interested witness, and is prosecuting only to aid him, we submit that there is no ground for complaint if the government is allowed to show that the prosecution had its inception in an earlier complaint made elsewhere and by other persons, especially when the



evidence and its consideration are carefully limited to that point.

So we say again, the question here is not the general admissibility of the Aberdeen letter. The question is whether, in the peculiar circumstances here disclosed, the court was right in allowing the prosecution in this way to meet the insidious claims made in open court by the counsel for the defendants. But for such accusations by defendants counsel, the letter would not have been received; there would have been no need for it.

But for such an issue, dragged in at the trial by counsel, if the defendants had committed a crime, it was immaterial who made complaint; it was immaterial whether an individual prosecutor might be so weak as to consider dismissal on the suggestion of an interested witness. But practical experience teaches that the average juror is not a trained logician. Defendants' counsel recognized this fact and sought to gain an advantage in the trial by putting upon the government the onus of championing the cause of a witness who they believed they could present to the jury in an unfavorable light. It was defendants' counsel who tendered the issue; and when they sought to attack the bona fides of the prosecution as they did, they have little ground for complaint that the court would not oblige the government to be silent and submissive under such an attack. The most that was done was to meet the contention made by the defendants through their counsel.

If the witness were unsavory, as counsel claim, they were skilled enough in the practical psychology of jury trials to see an advantage in tying him tightly to the government. Their claim did not comport with the facts, and they were denied the advantage they

sought by evidence which the government had at hand. The situation was of their own making; and they now seek a fresh advantage from it by asserting that it was error to deny them the advantage they sought in the trial.

The most that was done was to meet an issue raised by defendants' counsel. The evidence was repeatedly and carefully limited in its effect. In these circumstances it could not have been prejudicial to these defendants, even if it be regarded as an immaterial issue.

### **The Interstate Bridge Freight Rate.**

In the early part of 1915, the construction of the bridge across the Columbia River at Vancouver, Washington, was begun. At that time the Oswego plant of the Oregon company was not completed. The first combination was in effect, so that the California companies were staying out of Washington. The cement companies of Washington and California were jointly serving the state of Oregon as far south as Salem.

The prevailing price of cement at that time was \$1.90 a barrel at Portland or Vancouver, Washington. The Spokane makers of cement had not competed west of the Cascades, because of a freight rate of 25c per hundred pounds, which amounted to \$1.00 per barrel.

The Pacific Bridge Company secured the contract for the piers of the new bridge, and required some 300,000 barrels of cement. Mr. C. F. Swigert, president of the Pacific Bridge Company, desiring to get a better price on cement, and being in touch with one of the Spokane makers, the International, got a bid from that concern of \$1.65 per barrel f. o. b. Portland,

on condition that the Spokane Portland & Seattle Railroad would make a freight rate of  $13\frac{1}{2}$ c per hundred on cement. The International had a plant at Irvin, Washington, near Spokane.

Mr. Swigert saw Mr. W. D. Skinner, traffic manager of the Spokane Portland & Seattle Railroad, and obtained from him a written memorandum, agreeing to publish the  $13\frac{1}{2}$ c rate if the Spokane plant got the contract for the Interstate bridge cement. (Ex. 151.) Thereupon the Pacific Bridge Company contracted with the Spokane plant for cement at \$1.65 per barrel, and the Spokane company wrote Mr. Skinner advising him that the contract was closed and asking for the publication of the new rate.

Immediately the defendant Muhs, of the Santa Cruz and Standard companies, in San Francisco, heard about what had been done. There followed a series of telegrams, letters and conferences (see Ex. 75, Trans. P. 598 et seq.) between the California and Washington cement makers, in an effort to keep the rate from going into effect. Defendant Coats went to St. Paul, Minnesota, to the head offices of the Spokane, Portland & Seattle Railroad, while Eden went to Del Monte, California, to see Mr. Louis Hill, in an effort to have them direct Traffic Manager Skinner to withdraw his promise of the  $13\frac{1}{2}$ c rate. Defendant Baillie also saw Mr. Louis Hill. The freight rate of the other western Washington companies to Portland and Vancouver was  $8\frac{1}{2}$ c per hundred. The final result was that the rate was not published, but the California and Washington companies furnished the Interstate bridge cement at \$1.65 per barrel. Orders for the cement were placed with the Spokane company, but were filled by the California or Washington companies. Later one of the Washington com-

panies made a contract directly with the Pacific Bridge Company to supply the needed cement for \$1.65 per barrel, (Ex. 38) but a large part of the cement actually supplied was California cement. After this contract was filled, the Bridge company was not able to obtain cement except at prices higher than \$1.65.

This in brief is the history of what is referred to as the Interstate bridge matter, and complaint is made of the reception of this evidence. The results of this evidence are as stated in appellants' brief, viz: it "showed clearly that the western Washington cement plants and the northern California cement plants were working in harmony to prevent this rate going into effect, and to prevent such rate going into effect they were willing to and subsequently did, sell cement to the Pacific Bridge Company at less than the then prevailing market price in the city of Portland." They went a step farther, and in some way got the Spokane plant, which had a contract for the cement and a written promise of a favorable freight reduction, out of the way.

This was not claimed to be unlawful per se., but was offered in connection with the course of dealing of the cement companies for consideration in its relation to all the other facts in the case. We believe the reception of this evidence was proper and that Judge Bean's instructions were as favorable as defendants could rightly expect when he told the jury (Trans. pp. 467-468):

"I have permitted the government to introduce evidence tending to show that in 1915 the Spokane, Portland and Seattle Railroad Company promised to reduce its freight charges upon Portland cement from some point in Washing-



ton, to Portland and Vancouver, and that the western Washington cement manufacturers and perhaps some of the northern California concerns, combined to defeat such proposed change in freight rates, and that they succeeded in doing so by promising to supply cement from their mills, for the Interstate bridge, at the price for which cement for this purpose was offered by the Irvin plant, if the rate had been installed. Such action on the part of the Washington and California makers, if proved to your satisfaction, would not of itself constitute a violation of the statute on which this indictment is based, but it would by (be) evidence tending to support the charge of an illegal or unlawful combination.

It is entirely lawful for anyone to do what he can to prevent a transportation company from putting in a freight rate which he may deem unjust or discriminatory, and which he may think will injuriously and unduly affect his business. Any number of persons who may be similarly situated may join in opposing the institution of such a freight rate. It is admitted that the western Washington cement manufacturers and some of the California concerns combined, in 1915, to defeat a proposed change or reduction in freight on cement from Spokane, or Irvin, in Washington, to Portland or Vancouver, but this action on their part was not in itself unlawful or illegitimate and did not constitute a violation of the statute; but you have a right to consider their acts and conduct in that matter, and not only a right, but it is your duty to consider their acts and conduct in reference to this matter, as bearing upon the question as to whether they indicate

or tend to support the charge of an unlawful or illegal combination."

Counsels' argument is that this evidence is inadmissible because the acts disclosed were not in themselves unlawful. But is that sound law? Is that evidence relevant and material only which discloses the defendant in a criminal act? No cases have been cited holding such a rule; and all reason is against it. Probably no crime ever was committed but was made up of a combination of lawful and unlawful acts.

A murderer goes to the home of his victim—a perfectly lawful act in itself; but may it not be proved on the trial? He provides himself with a weapon, it may be an ax or a club or a gun. It is perfectly lawful for any man to do that, barring local police regulations about firearms. Is the evidence incompetent because the act is in itself lawful? Instances may be multiplied interminably.

In this case, the charge is a combination in restraint of trade. So far as it is proved by direct testimony, the first unlawful agreement was made in a conference of cement makers at San Francisco. Now in order to prove that, it would be material to show that certain individuals went to San Francisco at that time. Would not such evidence be admissible? Clearly it would. But what is unlawful about any man going to San Francisco?

Counsel rest squarely on this position. They say: "In other words evidence of the combination between cement manufacturers to do a lawful act cannot constitute evidence of an unlawful combination or a combination to do an unlawful act." If the Interstate bridge freight rate were the only fact in this case, there might be some force to that statement. But it is only one of the many facts here; and we be-

lieve it is entirely proper that that fact should be considered in its relation to the others in the case.

It is one thing to say that a group of cement men combined to forestall an objectionable freight rate; and it is quite another when the whole story is told—quite another thing to say that a group of cement men combined to allot between them the territory of the Pacific Coast and fix prices for cement therein; that the Californians withdrew from Washington, and only quoted in that state prices which they knew were higher than the Washington makers were getting; that the same Californians continued to sell lime and plaster in Washington; that the Washington makers sold cement in Oregon only as far south as Salem, by arrangement with the California makers; that the Washington makers had a freight rate to Portland of  $8\frac{1}{2}$ c per hundred pounds; that the prevailing price of cement f. o. b. Portland was \$1.90 per barrel; that an outside concern was promised a freight rate of  $13\frac{1}{2}$ c per hundred pounds to Portland, and contracted on that basis to sell cement at \$1.65 per barrel; that the same group of cement men used every means available to forestall the  $13\frac{1}{2}$ c freight rate, and to do so got the outside concern out of the way, and themselves supplied the cement at \$1.65 per barrel, and then went back to a higher price.

When an indictment charges that certain trade is monopolized in certain territory, and the defendants serving that territory expend so much energy in keeping out a would-be intruder, is it not material and relevant testimony? We submit that the Interstate bridge incident was one that was proper for the jury to consider in determining whether there was a combination in restraint of the cement trade. This detail with others combined to make up the complete pic-

ture. And we submit that evidence is not to be excluded because it shows a fact in itself lawful, a thing that any man has the right to do. If it were otherwise, few laws could be enforced; few offenders would be punished.

We have argued this point on the assumption that the acts of the defendants were lawful. The case was submitted to the jury on that assumption. The jury was instructed that "it is entirely lawful for anyone to do what he can to prevent a transportation company from putting in a freight rate which he may deem unjust or discriminatory. \* \* \* Any number of persons who may be similarly situated may join in opposing the institution of such a freight rate." (Trans. P. 468.)

This was a more favorable assumption to the defendants than they were entitled to. Because their actions in this matter may have been unlawful. They were lawful or not, depending on their ultimate purpose. If they were inspired only by honest objections to the freight rate, their actions were lawful. But if they found their inspiration in a purpose to keep out a competitor; to restrain unduly interstate trade in cement; to preserve for themselves the cement trade in the territory in which the combination was effective; to prevent the intrusion into that territory of a newcomer, then their actions were unlawful. And the court would not have erred had he submitted the facts to the jury on that basis, and left it for the jury to determine, upon all the facts, whether the interstate bridge incident was lawful or unlawful.

In *United States vs. Reading Company*, 226 U. S. 324-352; 57 L. Ed. 243-252, certain defendants had combined to defeat the construction of a competing railroad. The means adopted, separately considered,



were lawful, and the contention was made there, as here, that there was no violation of the law because they had done only those things which they had the right to do. The Supreme Court said: (352)

“But if the defendant carriers did \* \* \* combine to restrain the freedom of interstate commerce \* \* \* the parts of the general scheme, however lawful, considered alone, became parts of an illegal combination under the Federal Statute \* \* \* .”

See also *Swift & Co. vs. United States*, 196 U. S. 375-396 and *United States vs. Rintelen*, 233 Fed. 793-799.

### **Intrastate Business.**

Objection is made to the reception in evidence of letters relating only to cement trade within the state of Washington. It is argued that such letters could have no proper bearing on the question whether interstate commerce was restrained.

Before the combination was effected, there was interstate trade in cement in the state of Washington, in which the Washington and California companies were in competition. In order to determine the effect of the combination on that interstate trade, it is proper to examine the condition of the cement trade in Washington after the combination. A comparison of the cement trade under competitive and non-competitive conditions could not be immaterial because by reason of the combination, that cement trade in Washington had ceased to be interstate trade and had become entirely intrastate trade. Indeed the very change in the nature of the trade from interstate to intrastate brought about by the combination would establish the restraint of interstate commerce which

it is claimed was the purpose of the combination, and which the statute was enacted to prevent. It would be a strange situation if cement dealers in interstate trade could effect a combination by which part of them withdraw entirely from a state, leaving the others in undisputed possession, as the California companies did in this case, and the government could by such objection as this be prevented from showing the condition of the cement trade afterward in the state from which they had withdrawn.

#### **Exhibit 74.**

Counsel complain in their brief about these letters, saying they are in relation to promotion work, and to the activities of the National Portland Cement Association. It is not claimed that the illegal combination was effected through the national association, and the letters were not offered because of their statements in regard to promotion work. They are admissible for a different reason.

It will be remembered that the original combination was consummated in 1914. It is the theory of the government that some time early in 1916, before the cement of the Oregon mill at Oswego came on the market, there was a further meeting of the combining cement makers at San Francisco, at which time they readjusted their arrangements so as to make room for the product of the Oregon Company, as a result of which the Washington companies withdrew from Oregon.

One of the issues was whether there was such a meeting at San Francisco. Naturally the men who attended the meeting were not available to testify about it. Referring now to Exhibit 74, it is found to be a letter dated April 18, 1916, from defendant J. C.

Eden, of the Superior Company at Seattle to his co-defendant W. H. George of the Cowell Company at San Francisco, and George's response thereto.

Defendant Eden in the opening paragraph of his letter writes to Mr. George thus:

"Was mighty sorry on my visit to San Francisco last week not to have had time to have a few minutes talk with you, not only to speak to you about the Association, but to thank you personally for the wonderful party you gave us in San Francisco when I was there about two months ago \* \* \*"

This "wonderful party" may or may not have been the occasion of the readjustment to make room for the Oregon company. It shows that at the time in question defendant cement makers met at San Francisco. At the time referred to in the letter, defendant Butchart was at Del Monte and San Francisco, as his letters show, expecting to see the California and Washington makers. Mr. Eden's letter was only a circumstance, but the jury was entitled to consider it. Mr. George's letter has no importance, and its only reason for being in the case is that it was part of the correspondence between him and Mr. Eden.

### Exhibit 76.

As to Exhibit 76, it is a letter from Mr. Eden to Aman Moore written in March, 1916. This is the same Mr. Eden who is a defendant, and president of the Superior company at Seattle. The government claimed that the Washington companies agreed to withdraw from Oregon in 1916.

Exhibit 76 has one clause corroborating the government's theory, viz: "as we will probably not par-

ticipate in the cement tonnage of the State of Oregon, we can not see our way clear to assume any part of the expense of the promotion work." The only thing of interest in this letter is this statement that the Washington company would not participate in the Oregon cement business; but for that statement it is pertinent and admissible.

Exhibit 98 is Moore's answer to Exhibit 76.

### **Exhibit 77.**

Exhibit 77 is another of Mr. Eden's letters, this time to a co-defendant, Fred R. Muhs, of the Santa Cruz and Standard companies in California with Muhs' answer. Again it confirms the withdrawal of the Washington company from Oregon. The letter is dated July 29, 1916. He says:

"When the northern mills were marketing cement in Oregon, we made it a practice to employ an inspector" etc. Thus showing that the northern mills were no longer marketing cement in Oregon. It is another circumstance, not of prime importance either way, but sufficient to justify its admission.

### **Exhibit 89.**

This letter was written (Trans. 628) by Aman Moore to the defendant Butchart. A number of Mr. Butchart's letters were introduced, among them Exhibit 88 (Trans. 625) dated December 29, 1915, saying among other things:

"We will be unable to quote prices on any quantity until we have gone into the subject with the California and Washington makers \* \* \*

It will be difficult for us, a new company, to secure the higher price unless we are permitted to



name the price at which cement is to be sold in Oregon. An understanding should be arrived at whereby we are assured of disposing of the output of the 1 kiln plant. To obtain this will require careful handling, but I am in hopes that it can be done \* \* \*

Aman Moore's letter, which is Exhibit 89 was in response to the foregoing letter of Mr. Butchart. This letter of Moore is admissible because it is a part of the correspondence between the men, and also because, in response to the above quoted suggestions, Moore wrote the defendant (Trans. 628):

"As you know, it has been the universal practice in this country for a new plant when entering the market to force its way in by cutting prices \* \* \* If we can establish our own market without cutting prices, we will have performed a miracle \* \* \*

### Exhibit 105.

This exhibit consists of three letters (Trans. 651-654) passing between defendant W. H. George and Carl Leonardt, the latter being one of the stockholders of the Oregon company. They were written in February, 1916, at which time Mr. Butchart was in California where he said he was going to consult the California makers of cement. This exhibit shows that defendant George was trying to get in touch with defendant Butchart at that time.

### Exhibit 30.

Counsel's argument as to Exhibit 89 indicates that they intend Exhibit 30.

This is a letter written September 24, 1914, by de-

fendant Tyler Henshaw to defendant Butchart, at a time when the plant at Oswego was being projected. (Trans. 805-810.) It is a long letter, discussing the possible building of a new cement plant in California, (Trans. 806) and mentions the proposed Oregon plant. (Trans. 809.) The letter, in relating the writer's conversation with Leonardt, shows the natural attitude of an existing maker of cement toward a supposed new competitor. It also contains a very thinly veiled suggestion as to what the new Oregon company might expect in the way of competition at that time. It was material for the jury to compare Henshaw's expressions of attitude at that time, with what his attitude actually was when the Oregon plant began operating nearly two years later. This letter is another of the many circumstances which the jury was entitled to consider in determining the situation with reference to the cement combination. It is true the letter itself suggests no illegal combination.

It suggests the opposite; it suggests the serious competition the new Oregon mill might expect to meet. By telling defendant Butchart what he could and would do to Leonardt's new mill, he made Butchart ask himself what might be the fate of the new Oregon mill. But that was in 1914, and when two years later the Oregon mill began making cement, Henshaw's conduct was so unlike his promises that it fairly raises the question what brought about the change; and is proper for consideration in determining whether there was a combination.

### Evidence as to Prices.

Objection was made to evidence of the price paid by consumers for cement in 1916. Such evidence was proper under the indictment, which alleges that the

combination prevented the sale of cement in Oregon otherwise than upon arbitrary and non-competitive prices, fixed and agreed upon in advance, and further that consumers "have been compelled to pay for such cement arbitrary prices, and prices greatly in excess of the prices at which they would have secured such cement if said defendants had not engaged in said unlawful combination in restraint of such trade and commerce as aforesaid" (Trans. P. 14).

Counsel say that no attempt was made to show that these appealing defendants undertook to fix prices. We introduced the letter of defendant Butchart (Ex. 88, Trans. 625) in which he said he was going to confer with the Washington and California makers and wrote: "It will be difficult for us, a new company, to secure the higher price **unless we are permitted to name the price at which cement is to be sold in Oregon.**" In the face of this counsel argue "If consumers were deprived of the benefit of competition and were compelled to pay arbitrary prices for cement, the defendants on trial had nothing to do with this result." Such argument can not overcome the effect of such a letter as Exhibit 88.

## EXCLUDED EVIDENCE.

### The Minor Letters.

Complaint is made of the exclusion by the court of two letters written by Mr. Wirt Minor to Aman Moore, under date of July 25, 1916, and August 29, 1916 (Trans. 811-814). Also a telegram to Mr. Butchart from C. Boettcher, R. J. Morse and E. Possett dated July 27, 1916. (Trans. 825.) It is argued that these letters and telegram were offered to impeach Aman Moore and show that "Aman Moore,

notwithstanding the charges he had made against Butchart and Clark M. Moore, had agreed that the sales department should remain in charge of Clark M. Moore,, and that Butchart's powers as president should not be interfered with." (Brief 117.)

Mr. Minor was one of the directors of the Oregon company, and was its attorney. He was on the witness stand (Ev. 579 et. seq.) and had full opportunity to testify directly to any facts within his knowledge tending to impeach Aman Moore. Mr. Minor testified in detail regarding the suit for an injunction brought by Aman Moore, and to his own demand upon Aman Moore for the evidence of an illegal combination, but nothing was said in Mr. Minor's testimony about the letters of July 25 and August 29, 1916.

There is nothing in either of these letters to support in any way the claim now made that they were for impeachment, nor that Aman Moore agreed to be satisfied with Clark Moore or Mr. Butchart. Both letters were written by Mr. Minor. The first has to do entirely with the manner of calling a special meeting of the board of directors (Trans. 811-813). The second is a pointed demand by Mr. Minor that he be afforded an opportunity to investigate the facts which were the basis of Aman Moore's suit, an opportunity to examine the evidence of those facts, and that he be advised by what authority Aman Moore brought the suit in the name of the company. (Trans. 814.)

Not only do the letters themselves show nothing of impeachment, but no questions concerning them looking toward impeachment were asked of Aman Moore. It has already been remarked that Mr. Minor on the witness stand was silent about these letters. They were not offered for impeachment. They were



offered together, in the course of cross examining Aman Moore, in the following manner: (Ev. 212)

"Mr. Winfree: How about these others?

"Mr. Humphreys: I don't see that they are material; I don't care about them particularly except that they are not material. One of them is concerning the call of a meeting of directors and the other is a demand from Mr. Minor of Aman Moore to supply him with evidence in his possession.

"Court: I don't think these letters have anything to do with the case.

"Mr. Minor: We except to your Honor's ruling. We except to your Honor's ruling in regard to the letter which I wrote to Mr. Aman Moore July 25th, 1916, in which I expressed my willingness and desire to have this meeting called. The other I wrote him on August 29th and I desire to except to your Honor's ruling on that.

"Mr. Winfree: It is admitted they were sent and received?

"Mr. Humphreys: Yes."

Where no foundation for impeachment is laid, where the letters themselves are not of impeaching character, and where their author afterward is on the witness stand with full opportunity to give direct evidence of any impeaching facts within his knowledge, we believe there can be no error in excluding such letters as these.

The telegram (Trans. 825) is discussed here because counsel in their brief have grouped these three exhibits for discussion. Like the letters, the telegram is not of impeaching character. It is not signed by any of the defendants in the indictment, and no foundation for impeachment was laid in the examination of Aman Moore. The telegram was not signed

by him, nor addressed to him. It was first offered at the trial in connection with the evidence of Mr. Minor (Ev. 592-593) who testified:

"The telegram dated June (July?) 27th addressed to Mr. R. P. Butchart was either read to me or shown to me by Mr. Aman Moore; the other telegram I never saw until a few days ago, possibly a week ago, I don't know the exact date. I said telegram; I should say that either the original telegram or a copy of the telegram was shown or read to me; I don't know about the original."

"Mr. Winfree: Offered in evidence.

"Mr. Humphreys: I don't see that this telegram is material; addressed to Mr. Butchart, and signed by three persons not connected with this case.

"Mr. Winfree: I will ask the court to look at it before ruling on it; we offer this, your Honor, for the purpose particularly of impeaching Mr. Aman Moore, to show what the agreement was at that time and Mr. Moore's action in connection with his agreement with the company.

"Court: Was Mr. Moore asked anything about this?

"Mr. Humphreys: He was not.

"Court: Not called to his attention at all?

"Mr. Winfree: This particular telegram was not, but the meetings referred to were called to his attention and he testified with reference to meetings between Mr. Ross and himself afterwards and he denied that he was to take the position suggested in this telegram. It is a flat contradiction of Mr. Moore's testimony.

"Court: I don't think it is competent; signed by three not interested in this controversy; I don't think it is competent against Mr. Moore."

There can be no doubt of the correctness of the court's ruling. The principles on which it stands are elementary. If the defense expected to show, as counsel say, that Aman Moore agreed that Clark Moore should stay, and that Mr. Butchart's presidential powers should not be disturbed, their proper course was to bring to the witness stand the three men who signed the telegram. There was nothing in the court's ruling that barred them from producing such testimony, if it were available. They were not denied any right to impeach Aman Moore, nor to attack his credibility. But the rules for the impeachment of witnesses are well settled, and they do not permit of impeachment by the sort of evidence here in question.

## INSTRUCTIONS TO THE JURY.

### Monopoly.

It is argued that count two of the indictment limits the charge of monopoly to the state of Oregon, that the charge of the court to the jury is not so limited, and that it is therefore, erroneous. But such an instruction would not have been proper.

There is a distinction between the venue of the acts which produce the monopoly, and the effect of those acts on trade and commerce. Whatever was done in the state of Oregon by way of overt acts could have effect reaching beyond the boundaries of the state and produce monopoly elsewhere. Similarly interstate trade within the state of Oregon could be affected by acts committed without the state, but which produced monopolizing results within the state.

Count two of the indictment says that the defendants

“in and by engaging \* \* \* in the unlawful combination in restraint of the trade and commerce of said concerns in said first count described \* \* \* unlawfully have, in the District of Oregon and within the jurisdiction of this court, monopolized said trade and commerce, it being a part of the trade and commerce among the several states, etc.”

This shows not only the place where the monopolizing was done, i. e., in the District of Oregon; but also the thing monopolized, i. e., “said trade and commerce,” and the same count previously refers to “the trade and commerce of said concerns in said first count described.” Reference to the first count discloses that it describes the trade and commerce in cement carried on by the concerns named in the states of Oregon, California and Washington. It needs no argument to demonstrate that an act done within a state may have effect reaching beyond the boundaries of the state. There is no need to confuse the venue of the act with the thing on which the act has effect.

The charge of the court (Trans. 447) refers the jury to the indictment for details “You will have the indictment and can examine it at your leisure to ascertain the details of the statement. For the present purposes what I have said is, I think, sufficient. The second count charges the same parties, by means of the same arrangement and combination, with monopolizing the trade in cement in these several states.”

Defendants’ counsel, in requesting instructions on the monopoly count, used similar language (Trans. 845) and assign as error the court’s refusal to give their instruction. It is in these words:

“There is no evidence in this case which



tends to show that either R. P. Butchart or Clark M. Moore monopolized or attempted to monopolize the trade or commerce in Portland cement among the states or combined with any person or persons to monopolize any part of the trade or commerce in Portland cement among the several states. You will therefore return a verdict in their favor in the second count of the indictment."

In addition to framing this instruction, counsel failed to save a proper exception to the instruction given. The exception is noted at page 662 of the transcript of evidence, as follows:

"And also to except to so much of your Honor's charge as relates to monopoly."

That such an exception is inadequate is held in *Hammond vs. U. S.* (9 CCA) 246 Fed. 40-47 et seq. and *Jones vs. U. S.* (9 CCA) 265 Fed. 235-241. The vice in this exception is that it does not state any point as to which there was error. This point was raised for the first time in a brief filed by counsel in support of their motion for a new trial.

In *Hammond vs. U. S.* 246 Fed. 40-47, Judge Ross said, quoting 236 U. S. 512:

"The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any grounds other than the ones specifically called to the attention of the trial court." In *Jones vs. U. S.* 265 Fed. 235-241, Judge Morrow

quoted with approval the following language of Judge Ross:

“The rule is established, by decisions almost innumerable, that to entitle an appellant to call in question instructions given by the trial court to the jury, the exception or exceptions taken thereto must be sufficiently specific to direct the attention of the court to the particular error or errors complained of, to the end that the court may correct the error should one be found to exist, before the retirement of the jury.”

In discussing the instructions relating to monopoly, counsel in their brief complain about that part of the charge which says that the geographical limits of Drain or Roseburg on the south and the Deschutes River or Umatilla on the east were material as bearing only on the credibility of the witness Aman Moore. This part of the instruction appears at page 452 of the transcript. A reading of it will show at once that it refers only to count one of the indictment, and that it was not given by the court to the jury as a part of the charge relating to the monopoly count.

### **Butchart's Letters.**

Particular complaint is made of an instruction to the effect that the jury had the right to consider Butchart's failure when on the witness stand to say anything about the meetings in San Francisco referred to in his letters, or to offer any explanation of the letters or any other statements contained therein. As counsel say in their brief, this instruction was based on *Caminetti vs. U. S.*, 242 U. S. 470-493. The instruction itself is at pages 466-467 of the transcript, and is as follows:

“Now the defendants Moore and Butchart have each testified in this case. You should apply to their testimony the same rule that you apply to that of any other witness, and give them such faith and credit as you think their testimony is entitled to, keeping in mind, as you should, in weighing their evidence, the interests they naturally have in the result of this case. Mr. Butchart, however, while upon the stand, testified that he did not make certain statements attributed to him by Aman Moore, but said nothing about the letters written by him to Aman Moore; nor did he say anything about the meeting in San Francisco referred to in these letters, nor offer any explanation of the letters, or any other statement contained therein. Now this was his privilege, and being a defendant he could not be required to say more if he did not desire to do so, nor could he be cross examined as to matters not covered by direct testimony, but (in) passing upon the evidence in this case for the purpose of finding the facts, you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He can not be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case, to comment unfavorably upon the defendant’s silence. But where a defendant elects to come upon the witness stand and testify, he then subjects himself to the same rulings that apply to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish

against him, such failure may not only be commented upon, but may be considered by the jury with all the circumstances in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence, if there is any against him, he would have done so."

The objection most strongly urged by counsel to this instruction is that "there was nothing in these letters which Mr. Butchart was called upon to deny, and nothing in these letters which he was called upon to explain"; and also that he "could not be called upon to say anything about the 'meeting in San Francisco' referred to in these letters."

Before quoting the letters, we wish to refer to the situation, as disclosed by the record, in which the letters were written.

Defendant Butchart was a cement maker in British Columbia. For some years he had owned stock of the Washington Portland Cement Company to the amount of \$100,000. Since 1910 he had been financially interested in the Oswego project in the varying forms of its organization. In December, 1915, he became president of the Oregon company, which completed the construction of the Oswego plant and operated it.

The letters, then, were written by a man who was on the point of launching a new cement factory, in a country whose laws require the free and natural flow of interstate commerce along its accustomed channels; he was on the point of coming into the cement market in the only territory on the Pacific Coast where the cement trade retained its interstate character, namely in the state of Oregon. In that



state the California and Washington companies still carried on interstate trade in cement from Salem north to the Columbia river.

As the plant neared completion, the sales manager, Aman Moore, became increasingly anxious to adopt an aggressive sales policy. The correspondence between the two men, in this situation, shows clearly what was in defendant Butchart's mind. (Trans. 616-645.)

He wrote from British Columbia on June 14, 1915:

"Our company above all others has an object in keeping prices up. There is no reason for cement selling lower at Portland than at San Francisco and Seattle, **and I think I can aid in effecting this.**" (Trans. 623; Ex. 86.)

On December 29, 1915, he wrote from Victoria, B. C.:

"We will be unable to quote prices on any quantity until we have gone into the subject with the California and Washington makers. Unquestionably the price should be the same at Portland as at Seattle, San Francisco and Tacoma \* \* \* It will be difficult for us, a new company, to secure the higher price **unless we are permitted to name the price at which cement is to be sold in Oregon.** An understanding should be arrived at whereby we are assured of disposing of the output of the 1 kiln plant. To obtain this will require careful handling but I am in hopes that it can be done. \* \* \* I have no invitation, and in any case will be unable to attend the manufacturers' meeting in San Francisco, but **will meet one or more of the makers in Seattle** on Monday or Tuesday next and **will impress upon them our views.** I must be in Toronto on the 10th and

purpose returning home by way of San Francisco towards the end of the month and if necessary will try and arrange to have some of the Washington makers meet me there, to go into the whole subject, and as I am in very close touch with some of the makers, I think it better that you leave this entirely in my hands for the present." (Trans. 625-626; Ex. 88.)

He was at Del Monte and San Francisco in February and March, 1916, when Aman Moore wrote urging that a decision be made as to some matters concerning the sales department. Mr. Butchart wrote on February 15, 1916, from Del Monte:

"I hope to see Mr. Hinshaw and Mr. Coats shortly \* \* \* I have arranged to go to San Francisco on the 17th and will write you afterwards regarding sales \* \* \* Trans. 638; Ex. 92.)

Again writing from Del Monte on March 2, 1916:

"I note what you say regarding pushing sales and am quite as anxious as you that we should get busy on the sales end, but **we are not ready to make a quotation to any one.** Don't worry. Have you named any price for the car loads you have sold? (Trans. 639; Ex. 94.)

On March 14, 1916, he wrote from San Francisco:

"I can quite understand your impatience to push sales. **Some of the Washington makers will be here Friday. I expect we will have something definite next week,** in the meantime just as well to forego any expenditures in the way you suggest. (Trans. 643; Ex. 96.)

And finally from Los Angeles, on March 31, 1916, this very significant letter to Aman Moore:

"I learn with regret that you have recently

had Mr. Hollister in Washington soliciting business for our company. This is in the face of a request that you do nothing in this respect other than to advise the trade by circular letter that Oregon cement will be on the market in April. You assured me that you would do nothing further than this. I would ask you again to leave the sales alone for a time and I have written Mr. Newlands to confer with you regarding some other position in the works for Mr. Hollister. (Trans. 644; Ex. 97.)

Accompanied by a copy of letter to Mr. Newlands, then superintendent, saying:

**"Mr. Hollister has been doing things he should not do,** at Walla Walla, Washington, and Baker, La Grande and Pendleton, Oregon, and although Mr. Moore is responsible for this, I do not see that we require Mr. Hollister's services further in connection with sales. If you can find anything else around the plant that he can do and make himself useful you might arrange to retain him, but if you can not do so profitably you would better ask for his resignation."

(Trans. 644-645; Ex. 97.)

In addition to the foregoing letters, Aman Moore testified (Trans. 160; Ev. 137) that on arriving at Portland Mr. Butchart told him that he (Butchart) had had a meeting with California and Washington cement makers at San Francisco during the week of March 17 to 25, 1916, at which they agreed to limit the territory of the Oregon company, and that because of the invasion by Hollister of Washington and eastern Oregon territory under the direction of the witness, defendant Henderson of the Pacific Portland (California) and defendant Coats of the Wash-

ington Portland companies had said that Aman Moore was persona non grata as sales manager, and insisted that he be removed; and about three days after Mr. Butchart returned from California, Aman Moore was removed as sales manager and defendant Clark Moore was installed in his place.

Defendant Eden testified (Trans. 129; Ev. 78-79) that he met various Pacific Coast cement makers frequently at San Francisco from 1914 to 1916, and that at practically every meeting there were discussions as to prices charged and the territory served by the various mills.

Defendant Coats testified (Trans. 211; Ev. 222) about the original combination of 1914, and said there was a further conference at San Francisco in the winter of 1915-1916—he fixes the time as December, 1915—at which there were present practically the same persons who attended the former conference, and at which the Washington cement companies were told to get out of Oregon, and he said that they did so.

Other witnesses established the fact that after the Oregon company came into the market the Washington companies no longer sold cement in Oregon. (Halderman, Trans. 220; Nottingham, Trans. 216; Clark, Trans. 228, Ex. 116, Trans. 655; see also Ex. 76, Trans. 608; Ex. 77.) Oregon cement came on the market, not only without a reduction in price, but at a higher price than had been paid for Washington and California cement (Trans. 220, 224, 255) and the Oregon company did not sell in Washington, but ignored or evaded inquiries from Washington, from even so reputable a concern as the Denny-Renton Clay & Coal Company, which asked for a quotation on 100,000 barrels (Trans. 647) with the result, as testified by its general manager, (Trans. 262) "We



were not given any reason particularly; we were simply staved off from time to time."

Requests to the Oregon company from points in Washington for quotations were avoided (Exhibits 80, 103, 145, 146, 147, 148, 149, 150; Trans. 614, 615, 649, 668, 669, 670, 671, 672) or if a quotation was made, it was only after defendant Clark Moore had telephoned his co-defendant Eden, at Seattle to learn their price (Trans. 128-131) and then quoted a price which was not only higher than the Washington makers were quoting (Ex. 72, 73; Trans. 594, 595) but a price (\$2.68 per bbl. f. o. b. Seattle) which, allowing for freight, was higher than the Oregon company was getting at Portland.

This continued until the expose resulting from Aman Moore's law suit, and its culmination is shown by a telegram sent on August 29, 1916, by the assistant sales manager, J. E. Moore, to his brother, sales manager Clark M. Moore, at Denver, (Ex. 134; Trans. 547) as follows:

"Bitter complaint in director's meeting because we do not sell in Vancouver; lawyers also kick to beat the band; don't you think it best to establish agency there? Do not see how we can get around it with things going the way they are. I advise it."

This is a brief outline of the facts proved by the government, and indicates the condition of the case when the defendant Butchart took the witness stand. He limited his testimony (Trans. 354-357; Ex. 439-441) to a denial of the conversations testified to by Aman Moore. He did not deny that there were meetings at San Francisco of the kind Aman Moore told about; he merely testified that he did not tell Aman Moore there were such meetings. He did not deny

that there was an agreement with California and Washington cement makers limiting territory; he merely testified that he did not tell Aman Moore there was such an agreement.

Mr. Butchart was silent about his letters announcing his purpose to go to San Francisco to confer with the cement makers to the end that the Oregon company should name the price of cement in Oregon, and that an understanding be reached assuring his company of disposing of the output of the 1 kiln plant.

The letters show clearly what Mr. Butchart intended to do. The facts and circumstances show clearly what actually was done. When the whole case is considered, it is believed to come squarely within the rule in the Caminetti case. It will be seen, upon comparison, that the instruction complained of is as nearly in the precise language of the instruction that was approved in the Caminetti case as it was possible to make it.

The charge of the court did not put upon Mr. Butchart the burden of explaining every inculpatory fact shown or claimed to be established by the prosecution. It commented only upon his omission to speak about matters peculiarly within his own knowledge, namely, the letters written by him to Aman Moore, or the meeting in San Francisco referred to in those letters or to "offer any explanation of the letters or any other statement contained therein." The jury was then told:

"Now this was his privilege, and being a defendant he could not be required to say more if he did not desire to do so, nor could he be cross examined as to matters not covered by direct testimony, but in passing upon the evidence in

this case for the purpose of finding the facts, you have a right to take this omission of the defendant into consideration."

The Supreme Court, in approving the instruction in the Caminetti case, said (242 U. S. 470-494):

"When he took the witness stand in his own behalf, he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regard it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters which might incriminate him." \* \* \*

"We agree with the Circuit Court of Appeals that it was the privilege of the trial court to call the attention of the jury in such manner as it did to this omission of the accused when he took the stand in his own behalf."

The trial court might well have gone farther and remarked upon the failure of Mr. Butchart to explain why he displaced his sales manager for soliciting business in Washington, or his failure to explain what it was that Hollister had been doing that he "should not do," or his failure to explain why the Oregon company avoided quoting on cement inquiries from Washington, or his failure to explain how he launched a new cement factory concurrently with the withdrawal of the Washington companies from the Oregon market, or why the price of cement did not recede on the advent of the new product. It is so unusual for a manufacturer to regret that some one is trying to sell his product when he is on the eve of starting his factory, that it would at least have been interesting

to hear Mr. Butchart's reason why it caused him regret to learn that Hollister had been soliciting business for him in Washington.

### Clark M. Moore.

It is argued that as to Clark M. Moore "there is absolutely no evidence tending to show that at any time he knew of any alleged combination or agreement."

The jury found that there was such a combination; and there was ample evidence on which to base such a finding. The question here is whether there was sufficient evidence to justify the verdict against Clark Moore.

The general situation of the Oregon company at the time when Clark Moore became sales manager has been pointed out. So far as is possible, we will avoid repetition.

The case against Clark Moore is this: He was brought in from Denver as sales manager to displace a former sales manager who had been dismissed for failing to observe the territorial limits that had been fixed; he came from Denver to Portland by way of San Francisco at the invitation of California cement makers to confer with them; he knew of the understanding that the Washington companies were to stay out of Oregon; when he reached Portland he was told of the combination in detail by Aman Moore; and with such knowledge, he conducted the sales of the Oregon company in conformity with the understanding existing among the cement makers, refusing to quote in Washington, and observing the agreement as to price. We will now refer to the record supporting these statements.

That he knew he was taking the place of a deposed



sales manager who was dismissed for failure to observe the agreement, see Trans. 161-162, where Aman Moore testified:

"We also discussed the removal of Mr. Hollister from the sales department and Mr. Butchart's direction about it because Mr. Hollister had been soliciting business for our company in the state of Washington. We discussed the whole situation and everything pertaining to the combine, the matters of these inquiries, and especially those about the territory which we were not supposed to ship or quote."

His coming by way of San Francisco to confer with California cement makers at their invitation is shown by his own letter (Trans. P. 676) in which he said:

"I am going to Portland, Oregon, via San Francisco, where I will see our friends, and I am very much pleased to have received letters since I saw you, from Mr. Erlin, of the Pacific Portland Cement Co., and Mr. Muhs, of the Santa Cruz Co., asking if it would not be possible for me to go to Portland via San Francisco, so as to discuss matters of interest \* \* \*."

That he knew of the understanding that the Washington companies were to stay out of Oregon, see his own letter (Ex. 138, Trans. P. 664) of April 27, 1916, to Hollister, in which he said:

"Regarding the Washington and Olympia Portland cement companies selling cement in Portland again on a temporary arrangement, would say for your information, it is my understanding that they have some contracts they are completing \* \* \*."

We have already referred to the record (Trans.

161-162) that Aman Moore told him about the combination on his arrival at Portland.

That he carried out the purpose of the combination as sales manager of the Oregon company, is shown by the following:

Aman Moore had received over one hundred replies to his circular letter to the cement trade. Among them were the inquiries from Washington. These were turned over to Clark Moore when the latter became sales manager.

The policy of Sales Manager Clark Moore toward Washington inquiries is disclosed in these letters:

To Auburn, Washington: "We have been unable to obtain satisfactory freight rates into your territory. We doubt very much whether we will be able to quote attractive prices to you \*  
\* \* (Memo for Mr. Moore) Auburn between Tacoma and Seattle. May be friends of Washington plants after data. Hollister." (Trans. P. 669).

To Chehalis, Washington: "We thank you for your letter of June 7th, regarding your handling our cement, and would say that it is not our intention to establish any jobbing agencies anywhere." (Trans. P. 669.)

In connection with the Chehalis letter it should be noted (Trans. P. 670) that the Chehalis dealer said nothing about a jobbing agency, but had asked for a quotation on 500 barrels of cement, f. o. b. Raymond, Washington, and for a price on carload lots at Chehalis.

To Aberdeen: "Your telegram of June 13th did not reach this office until today (16th), having evidently been delayed at Oswego, and consequently we know we are too late to give you

a price on the 3,000 barrels of cement you asked for \* \* \*. (Trans. P. 671; Ex. 147.)

To Centralia: "We regret very much at this time we are unable to quote you on cement. The rate question in your territory has not been settled, and until same is adjusted, nothing can be done." (Trans. P. 672; Ex. 148.)

When a Seattle concern asked for a figure on 5,000 barrels, (Trans. P. 594) defendant Clark Moore in person telephoned to Eden at Seattle (Trans. pp. 127, 131) to learn the price being quoted by the Washington cement makers; and thereupon quoted (Trans. P. 594) a higher price than the Washington makers were asking, (Trans. P. 595) and a price higher than the Oregon company was getting at Portland. The Portland price was \$2.30. Freight to Seattle was 8½c per hundred (Trans. P. 630), or 34c per barrel. A price of \$2.68 f. o. b. Seattle, therefore, was \$2.34 at Portland.

The excuses given about freight rates were a shallow subterfuge, because as early as December 31, 1915, (Trans. P. 630) freight rates had been arranged by Aman Moore (Trans. P. 173) long before Clark Moore succeeded him as sales manager.

Further, after so actively avoiding any Washington business, when Clark Moore received the telegram of August 29, 1916, from his brother, as follows: (Trans. 547; Ex. 134)

"Bitter complaint in directors' meeting because we do not sell in Vancouver; lawyers also kick to beat the band; don't you think it best to establish agency there? Do not see how we can get around it with things going the way they are. I advise it."

Then, and only then, did Clark Moore make an effort to secure business in Washington.

We believe this record was sufficient to justify the court in submitting to the jury the question whether Clark Moore became a party to the unlawful combination and carried it into effect.

It is argued that it was erroneous for the court to charge the jury that it might consider the relationship of defendant Butchart to the Portland cement company, prior to the organization of the Oregon Portland Cement Company, and his activities in connection with the Oswego plant under both these corporations.

The thing under observation was the development of a cement factory at Oswego, Oregon, and its relation to the existing cement combination. Butchart was interested in both corporations. Both corporations had the common purpose of completing the Oswego plant. The first failed; the second succeeded it, and made a success of the Oswego project.

The story of the defendants' connection with the cement combine, and with the Oswego plant can not be told nor understood without including what was done in 1914 and 1915 when the first corporation, the Portland Cement Company was in existence. The history of the thing shows the active interest of defendant Butchart in the Oswego plant under both corporations.

Counsel say in their brief that "the jury was instructed by the trial court that they might find the defendant Butchart guilty upon the letters alone without any proof that he actually entered into any agreement or combination, or conspired with the other defendants, or any of them." Counsel undoubtedly intend this as argument, and not as a statement



of fact; because no such instruction as this was given. On the contrary the jury were told that the defendants could not be convicted unless they found there was a restraint of trade or monopoly as a "result of a previous agreement or tacit understanding between the parties charged, and the defendants on trial were or became parties to such combination." (Trans. P. 470.)

We believe we have discussed all the specifications which have been argued in the brief. Many other errors were assigned, but have not been argued. We have not discussed them, because we do not know what counsel claim for them.

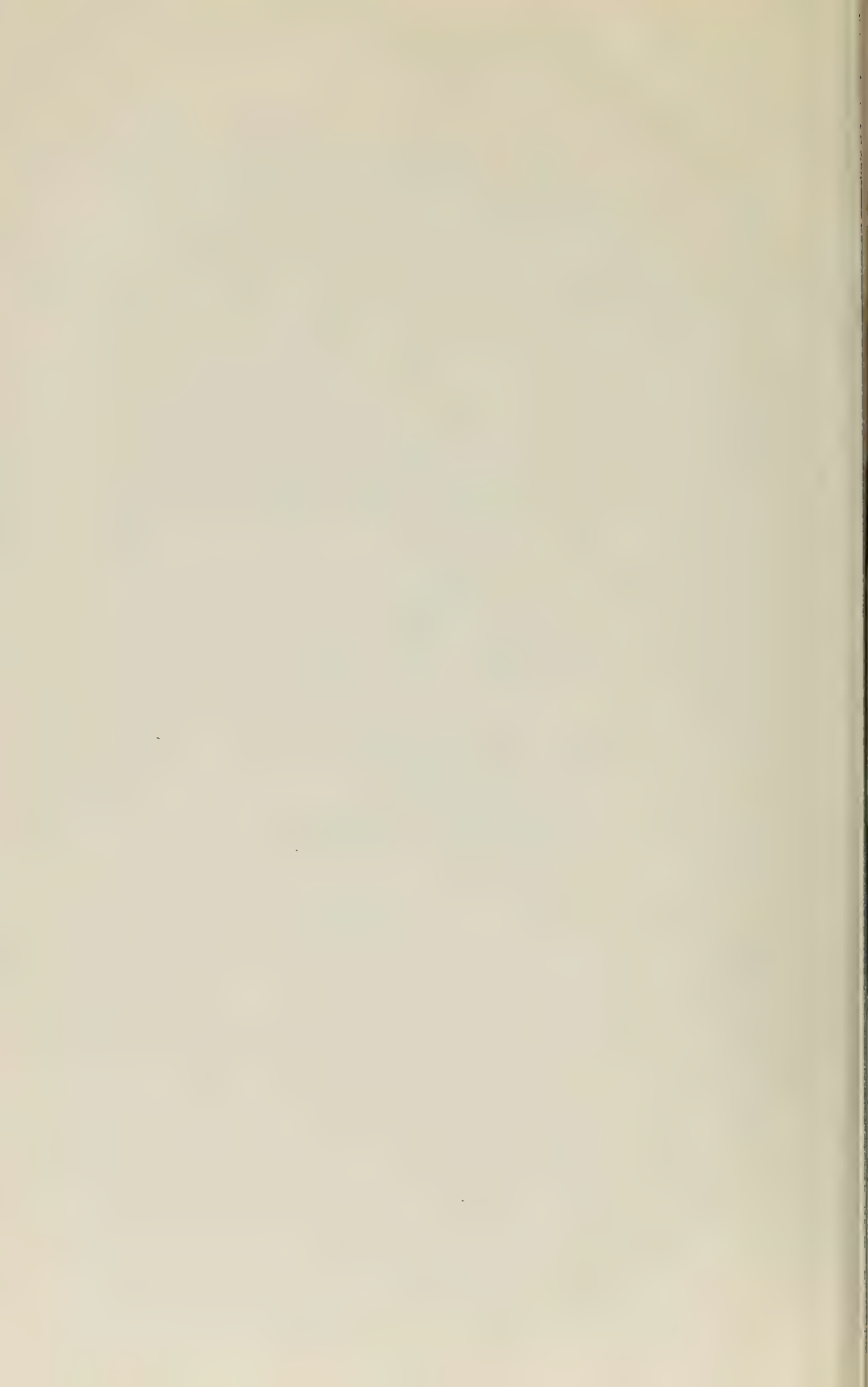
It is confidently believed that an examination of the record will show that there was no prejudicial error; and that the judgment of conviction ought to be affirmed.

Respectfully submitted,  
JOHN S. COKE,  
United States Attorney for Oregon.  
LESTER W. HUMPHREYS,  
Special Assistant United States  
Attorney for Oregon.

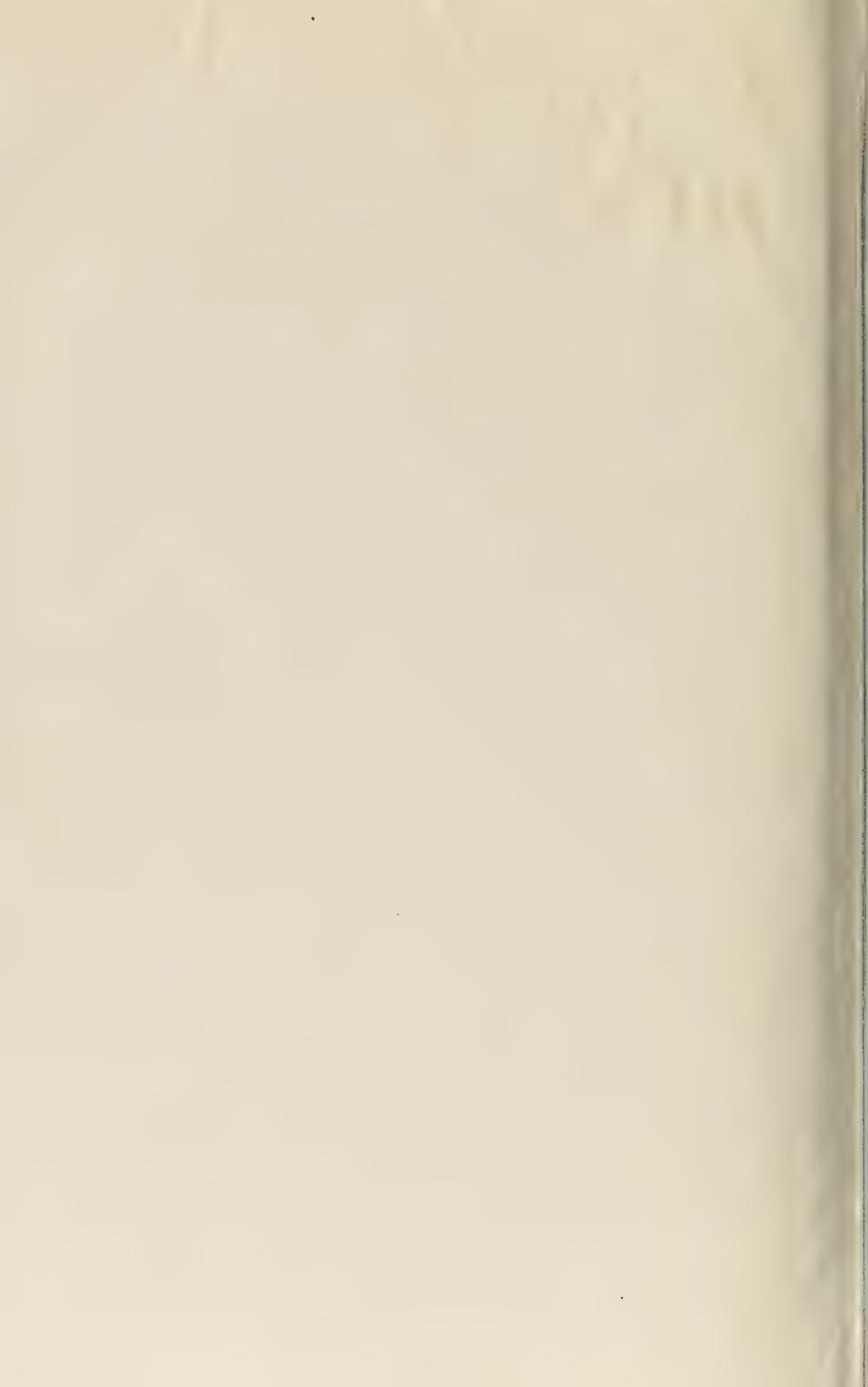
UNITED STATES OF AMERICA,      ss.  
DISTRICT OF OREGON

Due legal and timely service of the within Brief is hereby admitted and accepted within the State and District of Oregon, on the 15th day of September, 1923, by receiving a copy thereof duly certified to as a true and correct copy of the original by Thos. H. Maguire, Assistant United States Attorney for the District of Oregon.

A. B. WINFREE,  
Attorney for Plaintiffs in Error.









# San Francisco Law Library

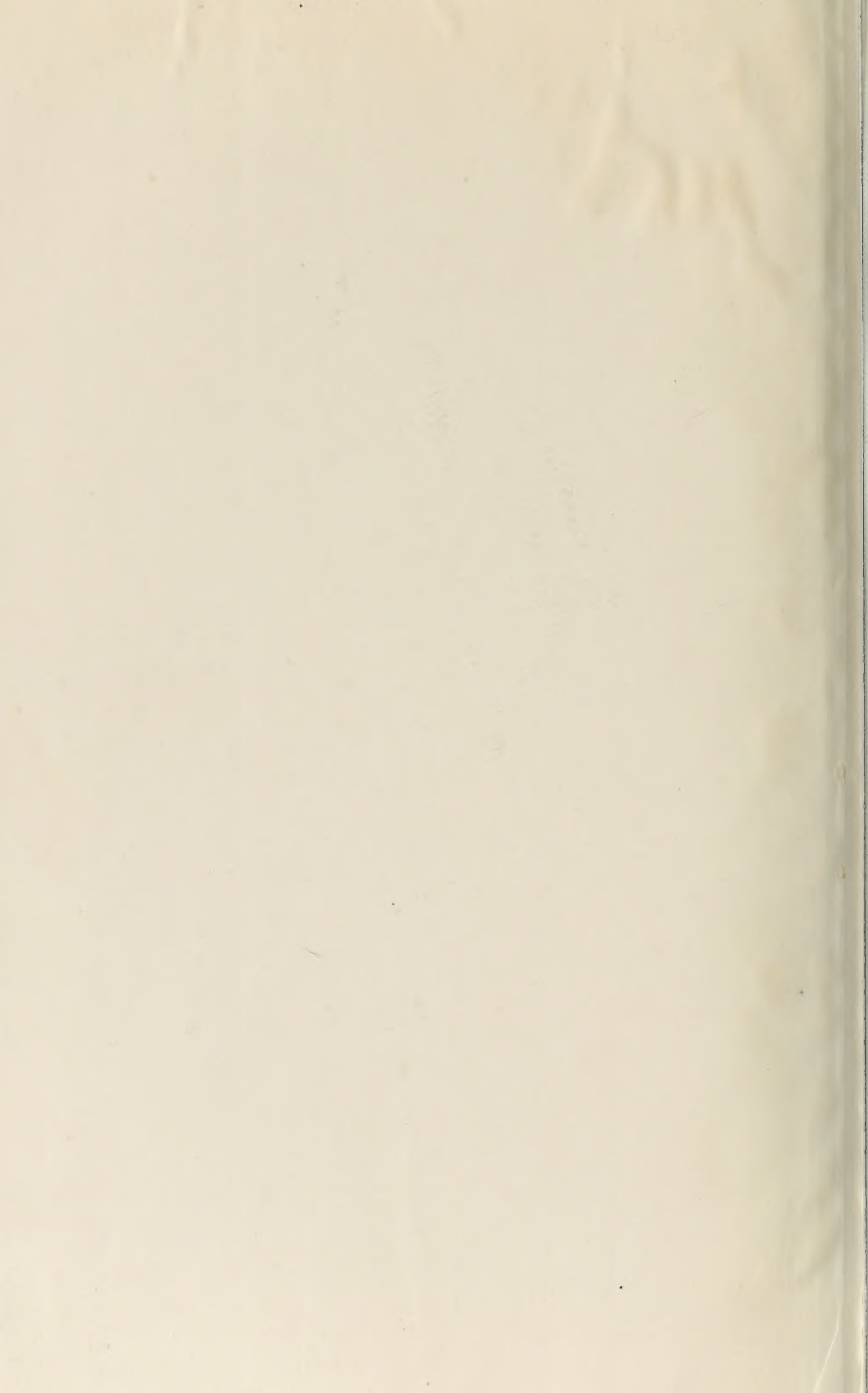
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